Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RUI ONE CORPORATION,

Petitioner,

v.

CITY OF BERKELEY, ET AL.,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Shortly after enacting its generally applicable and prospective "living wage" ordinance, the City of Berkeley ("Berkeley") amended that ordinance in a manner that applies retroactively only to the Petitioner in this case, one of Berkeley's long-term lessees. A divided panel of the Ninth Circuit upheld Berkeley's singling out of Petitioner for the immediate imposition of the living wage ordinance's requirements.

The questions presented are:

1. Whether the Ninth Circuit, in conflict with decisions of this Court and decisions of the First, Fifth, Seventh, Tenth, and Eleventh Circuits, erred when it held that municipalities have "virtually unreviewable" discretion to legislate incrementally against one business at a time to achieve a broad social and economic objective, and that evidence of improper legislative motive is "entirely irrelevant" for purposes of a "class of one" claim under the Equal Protection Clause.

2. Whether Berkeley's narrowly targeted amendment of its "living wage" ordinance violates the Contract Clause because that amendment imposes significant new contractual obligations upon Petitioner that Berkeley had failed to secure in recent renegotiations of its lease with Petitioner.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Plaintiff RUI One Corp., a Minnesota corporation, is the wholly-owned subsidiary of Restaurants Unlimited, Inc., a Washington corporation.

Defendant City of Berkeley is a municipal corporation organized under the laws of the State of California.

Defendant-Intervenor Hotel Employees & Restaurant Employees Union Local 2850 is the local chapter of the Hotel Employees and Restaurant Employees Union, a tax-exempt organization under Internal Revenue Code § 501(c)(5).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner RUI One Corp. ("RUI") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

The Ninth Circuit's split decision upholding Berkeley's amendment of its "living wage" ordinance to apply, in practical effect, to a single business raises important and closely related Equal Protection and Contract Clause issues for this Court's consideration. Under the Ninth Circuit's decision, municipalities nationwide would have "virtually unreviewable" discretion to rewrite its contracts retroactively with individual businesses by legislating incrementally against one business at a time — based on nothing more than a highly attenuated relationship to a broad, generalized social objective — and irrespective of evidence of improper legislative motive, such as the desire to penalize Petitioner for remaining a non-union restaurant.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's June 16, 2004 split decision affirming the District Court's entry of summary judgment (Pet. App. 1a-66a) is reported at 371 F.3d 1137. The District Court's March 13, 2002 opinion granting summary judgment to the defendants (Pet. App. 67a-86a) is unreported.

JURISDICTION

The Ninth Circuit entered its judgment on June 16, 2004. It then denied RUI's timely petition for panel rehearing and rehearing en banc on August 2, 2004. Pet. App. 87a-88a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV, § 1.

The Contract Clause provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST., art. I, § 10, cl. 1.

STATEMENT OF THE CASE

This case is about whether Berkeley violated the Equal Protection and Contract Clauses of the United States Constitution when it legislated so selectively as to impose additional financial obligations upon a single economic entity — RUI — that is locked into a long-term lease with Berkeley, and that has been targeted for remaining a non-union restaurant.

1. RUI One Corp. ("RUI") is a wholly-owned subsidiary of Restaurants Unlimited, Inc., a Washington corporation. Pet. App. 13a. RUI does business as "Skates on the Bay" ("Skates"), a restaurant and lounge located at the Berkeley marina in Berkeley, California. *Id.* at 67a-68a.

RUI began operating Skates in 1984 when it assumed a fifty-year municipal lease, running from 1967, for property located in Berkeley's marina. The lease required RUI to "construct, maintain and operate thereon a major first-class restaurant and cocktail lounge for the convenience and promotion of commerce, navigation and fishery in the Berkeley Marina and for no other purpose." Pet. App. 13a. In exchange, RUI agreed to pay annual rent equal to the greater of $11,400 or 2.5% of Skates' annual gross receipts. *Id.* Upon renegotiation of the lease in 1996, this percentage was increased to 3.0% until June 30, 2007, and then 3.3% thereafter until expiration of the lease. *Id.* at 13a-14a. Berkeley waited until its lease with RUI was renegotiated in 1996 to bargain for — rather than legislatively require — (1) a higher rental payment, (2) the installation, at RUI's expense, of a new grease trap, and (3) RUI's payment for landscaping. *Id.* at 43a-44a. The lease further required RUI to (1) charge its customers "reasonable rates" consistent with similar establishments in the area; (2) "employ its best judgment, efforts and abilities" to produce the maximum profitable volume of sales, rents and transactions maintainable; (3) "maintain ade-

quate personnel for the efficient service of customers"; and (4) not discriminate with regard to "rates of pay or other forms of compensation." Pet. App. 13a, 62a, 73a.

Berkeley's original "living wage" ordinance, adopted on June 27, 2000, requires the inclusion of a provision mandating compliance with its terms in any *new* municipal contract or lease (or any amendment to an existing contract or lease). *Id.* at 9a; *see also* Berkeley Ordinance No. 6548-N.S. (2000) [hereinafter "LWO"]. The original LWO was adopted, as was the Amendment, with the stated purpose of combating poverty amongst the working poor. *See* Pet. App. at 80a (City Council's finding that the LWO's "creation of living wage jobs [will] increase consumer income, decrease levels of poverty, invigorate neighborhood businesses and reduce the need for taxpayer-funded social programs in other areas"); *id.* at 57a (reciting the City's findings that "'far too many people . . . live below or near the poverty line,' [and] that inadequate compensation 'fails to provide service employees with resources sufficient to afford life'"); *id.* at 81a (City Council's finding that the Amendment will "improv[e] the quality of life of [service] employees").

The LWO, when applied, requires employers operating under such a municipal lease to pay its employees a wage significantly higher than the federal or state minimum wage. Pet. App. 8a-9a. The required wage was originally not less than $9.75 per hour with paid medical benefits, or not less than $11.37 per hour without paid medical benefits (now it is $10.82 with benefits and $12.62 without). *Id.* at 8a. The LWO also mandates the provision of at least twenty-two days of leave for sickness, vacation, or personal necessity, and twelve of those are to be paid leave. *Id.* at 9a.

The LWO provides an exemption for employers who have entered into "a bona fide collective bargaining agreement where the waiver of the provisions of this Ordinance are [sic] set forth in clear and unambiguous terms in such an agreement." Pet. App. 39a. No specification of a minimum

wage or vacation pay is required in the case of such union shops. *Id.* at 39a-40a.

The LWO applied *prospectively*; therefore, when it was enacted, it had no effect upon RUI's existing lease with Berkeley. Berkeley's City Manager, in a memorandum to the Mayor and City Council, recognized that the LWO could not have any impact on businesses until a period of open negotiation of the lease terms such that they could be "'reassemble[d].'" Pet. App. 39a-40a.

In July 2000, the Hotel Employees & Restaurant Employees Union Local 2850 ("the Union") pressed Berkeley's City Council to amend the LWO such that its requirements would apply immediately, in practical effect, *only* to two non-unionized marina businesses, one of which has since become unionized. *Id.* at 40a-41a.

On October 19, 2000, Berkeley complied with the Union's wishes. *See* Berkeley Ordinance No. 6583-N.S. (2000) ("the Amendment"). The Amendment is narrowly crafted to apply to (1) businesses in a small geographic area of Berkeley known as the Marina (2) that employ six or more people, (3) that receive at least $350,000 in annual gross receipts, and (4) that are not unionized. *See* Amendment § 2. Unlike the original LWO, the Amendment *retroactively* applies to RUI's existing lease, with no opportunity for the negotiation of offsetting decreases in rent owed Berkeley.

RUI has estimated that the retroactive enactment of the Amendment would result in an increase in labor costs of $121,000 per year — a 61% increase "in the cost to RUI of satisfying its contractual obligations under the lease." Pet. App. 50a-51a. The Amendment, by its specific terms, applies to "RUI and, perhaps, no one else." *Id.* at 53a.[1]

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[1] The only other businesses to which the Amendment conceivably could apply — HS Lordships and the Radisson Hotel — are exempt because they have collective bargaining agreements with the Union. *Id.* at 53a.

2. RUI filed a complaint in the United States District Court for the Northern District of California on October 19, 2000, requesting declaratory and injunctive relief against Berkeley. Pet. App. at 14a. After RUI moved for summary judgment, the District Court granted summary judgment in favor of Berkeley on March 13, 2002. *Id.* at 67a-84a. The court denied RUI's Equal Protection Clause claim, concluding that the asserted rationale for the Amendment survived rational basis scrutiny. *Id.* at 79a-82a. It denied RUI's Contract Clause claim on the ground that the Amendment did not substantially impair RUI's contractual relationship with Berkeley. *Id.* at 69a-79a. Finally, it rejected RUI's Due Process claim, concluding that there was no improper delegation by Berkeley of its legislative power to the Union. *Id.* at 82a-84a.

3. The Ninth Circuit heard RUI's appeal, and affirmed, by a split 2-1 vote, over a dissent by Judge Bybee.

Relying on precedents deferentially reviewing classifications that are part of *generally applicable* laws and according legislatures broad latitude to approach socioeconomic problems "'one step at a time,'" the panel majority jumped to the conclusion that such precedents warranted legislating against one single business at a time to achieve broad public policy objectives. Pet. App. 31a (quoting, *e.g.*, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993)). Without considering whether the means-ends relationship necessarily would become far more attenuated when a municipality ostensibly addresses a perceived problem of broad social import (here, poverty amongst the working poor) by singling out a single business (RUI) to bear the burden of paying for that problem, the majority simply held that such "class of one" legislation is "'virtually unreviewable.'" *Id.* The panel majority also held that it was "'entirely irrelevant for constitutional purposes'" whether Berkeley acted out of improper motives to penalize non-unionized marina businesses such as RUI for remaining a non-union restaurant. *Id.* at 30a-31a. Finally, the majority rejected out-of-hand any "class of one" equal protection claim by RUI because, in its view, RUI was

not sufficiently "vulnerable," without any basis in the record for that assumption. *Id.* at 32a.

In rejecting RUI's Contract Clause claim, the panel majority similarly ignored the distinction between laws of general applicability and narrowly targeted attempts at "legislating" revisions to a government contract. Applying the three-part test established in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), the panel majority concluded that the Amendment did not violate the threshold requirement of a "substantial impairment" of a contractual relationship. Pet. App. 14a, 27a. It found that the RUI lease contained no provision explicitly stating how much RUI would pay its employees, and it refused to imply any such terms, denying that RUI's expected operating costs, including labor costs (which would be higher than any other business's, resulting in an uneven playing field), were "so central to the bargained-for exchange between the parties." *Id.* at 18a. The panel majority further concluded that if Berkeley could not impose retroactively unique obligations on a single municipal lessee, it would have surrendered "'an essential attribute of its sovereignty,'" and thus such a limitation would be void as against public policy. *Id.* at 19a-20a (citation omitted).

Judge Bybee dissented, explaining that "Berkeley succumbed to" "the temptation to secure by legislation what a state has failed to achieve through negotiation" "by employing its sovereign power to secure terms that it failed to negotiate in its proprietary capacity with RUI." *Id.* at 36a.[2]

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[2] As Judge Bybee explained:

> The Marina Amendment's cost to RUI . . . was far greater than that of the other provisions that RUI and Berkeley actually negotiated. During the last negotiations of the lease in 1996, Berkeley and RUI bargained over who would bear the $50,000 cost of installing a "grease trap." Even more telling, they bargained over $7,000 in landscaping costs. If the parties perceived that these expenditures were sufficiently material to warrant negotiation, then the Ma-

Berkeley's Amendment is "a rule of neither general nor prospective applicability." *Id.* (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266-67 & n.20 (1994); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191-92 (1983)). Consequently, "the Marina Amendment differs from an exercise of police power in two respects: (1) it singles out RUI for a change in its contract rather than applying generally to a broad range of employers; and (2) it retroactively alters the bargain that RUI and Berkeley struck." Pet. App. 52a. "[B]ecause the Marina Amendment is neither generally nor prospectively applicable," Judge Bybee reasoned, "it is not a valid exercise of police power. . . ." *Id.* at 55a.

4. RUI's petition for panel rehearing and petition for rehearing en banc, which drew the support of the U.S. Chamber of Commerce and the Pacific Legal Foundation as *amici curiae*, was denied on August 2, 2004. Pet. App. 87a-88a. Judge Bybee voted to grant the petition for rehearing. *Id.*

5. RUI next filed a motion to stay the mandate pending application for a writ of certiorari in this Court. The Ninth Circuit granted this motion on August 10, 2004. Pet. App. 89a.

REASONS FOR GRANTING THE WRIT

This Court has warned of the dangers of allowing the government to legislate incrementally against one single individual or business at a time, absent at least a rational justification that legitimately sets that individual or business apart from all others. It has done so not only in the Equal Protection and Contract Clause contexts, but also under several other related provisions of the Constitution, such as the Bill of Attainder and Due Process Clauses. As early as 1884, in

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[Footnote continued from previous page]

> rina Amendment — which could raise labor costs by more than $100,000 — is certainly a substantial impairment.

Pet. App. 51a.

the wake of the Fourteenth Amendment's adoption, this Court explained:

> *Law . . . must be not a special rule for a particular person or a particular case*, but [rather] "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power. . . . *The enforcement of these [constitutional] limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, . . . against the power of numbers. . . .*

Hurtado v. California, 110 U.S. 516, 535-36 (1884) (emphases added).

This Court is "much more likely to find arbitrariness in the regulation of the few than of the many" because the ordinary operation of the political process cannot be trusted to guard against "arbitrary and unreasonable government" action when legislation is enacted against one individual or business at a time to remedy generalized societal problems. *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J. concurring). As Justice Jackson presciently observed more than half a century ago:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. *Conversely, nothing opens the door to arbitrary action*

> *so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.* Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Id. at 112-13 (emphasis added); *see also Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo.*, 239 U.S. 441, 445-46 (1915) (noting that where a "relatively small number of persons [are] concerned," a danger exists that the legislature acted on behalf of special interests rather then the general good).[3]

Casting these principles aside, the divided Ninth Circuit panel below misread this Court's statements, made in the context of generally applicable laws, that "'the legislature must be allowed leeway to approach a perceived problem incrementally'" and to "'take one step at a time'" to mean that governments enjoy the same degree of "leeway" to legislate against a *single* business or individual at a time to achieve a broad socioeconomic objective. Pet. App. 31a (quoting *Beach Communications*, 508 U.S. at 316). Such a dangerous and unsupported leap of logic fails to take account of the far more attenuated means-end relationship that necessarily exists when a municipality legislates against a "class of one" such as RUI, absent any findings or indication that that single business has contributed any more than other businesses to the broad, generalized problem or policy objective

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[3] *Cf. United States v. Brown*, 381 U.S. 437, 461 (1965) (explaining, in the Bill of Attainder context, that "Congress must accomplish [its desired] results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied."); *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring in judgment) ("Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to 'the tyranny of a shifting majority.'").

that the municipality ostensibly is attempting to address. This leap of logic is particularly deserving of this Court's attention here, because there is record evidence of improper legislative motives that the panel majority deemed "entirely irrelevant." *Id.* at 30a. It is also cert-worthy because the substantial number of businesses that have entered into municipal leases and contracts are threatened with the prospect that their municipalities, like Berkeley here, may unilaterally "legislate" changes to those contracts that the municipalities were not able to obtain through arms'-length bargaining.[4]

I. THE NINTH CIRCUIT'S EQUAL PROTECTION RULING RAISES AN IMPORTANT AND RECURRING ISSUE, CONFLICTS WITH THIS COURT'S DECISIONS AND DECISIONS OF OTHER CIRCUITS, AND WARRANTS THIS COURT'S REVIEW

A majority of the divided Ninth Circuit panel rejected RUI's "class of one" claim under the Equal Protection Clause by applying the rational basis standard in a way that renders judicial scrutiny *meaningless* in cases involving laws passed because of improper legislative motives that single out individual businesses to bear the burden of paying for broad, generalized societal problems. It does so in a way that not only conflicts with and misconstrues this Court's precedents, including *Village of Willowbrook v. Olech*, but also deepens a split of authority amongst the Circuits on an important and practically significant question of federal constitutional law.

In *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), this Court held — in a brief *per curiam* opinion —

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[4] As Berkeley's City Attorney tellingly stated, the Ninth Circuit panel majority's ruling is "helpful," because it establishes that "you can go after a problem in an incremental fashion. . . . You can target a particular industry, a business that operates in a particular way or in a certain zone of the city." Henry Weinstein, *Berkeley's Living Wage Ordinance Is Upheld in Federal Appeals Court*, L.A. TIMES, June 17, 2004, at B6.

that a plaintiff *could* proceed with an equal protection claim as a "class of one." *Id.* at 564 (citations omitted). This Court held that to defeat a motion to dismiss, the plaintiff need only allege that (1) the defendant has intentionally treated her differently from others similarly situated, and (2) there is no rational basis for the difference in treatment. *Id.*

Considerable confusion and a split of authority exist amongst the Courts of Appeals about the standard of proof and what factors are relevant to proving a "class of one" equal protection claim under *Village of Willowbrook*, once a "class of one" case moves beyond the pleading stage.

1. Specifically, the Ninth Circuit has contributed to the confusion in the lower courts over what "rational basis" scrutiny entails in the "class of one" context. As Judge Posner recently explained:

> The troubling question is what exactly the plaintiff in such a case must prove in order to make out a prima facie case. In *Village of Willowbrook v. Olech* . . . the Supreme Court held that it is enough to allege "irrational and wholly arbitrary" treatment. . . . Did the Court mean to suggest by its choice of words that the "rational purpose" test used standardly in equal protection jurisprudence for cases not involving "fundamental rights" also rules class-of-one cases? . . . Or should "irrational and wholly arbitrary" be understood as a more stringent test? But if so, what is its precise meaning? And what significance should be attached to the fact that the case had been decided on the pleadings?

Bell v. Duperrault, 367 F.3d 703, 710 (7th Cir. 2004) (Posner, J., concurring).

Even if "irrational and wholly arbitrary" should "be understood as a more stringent test" than the traditional rational basis scrutiny that applies to generally applicable socioeconomic classifications, the Ninth Circuit panel majority's assumption that "class of one" classifications are "virtually unreviewable," Pet. App. 31a, is flawed, given the inherently

attenuated means-end relationship that ordinarily exists in the "class of one" context. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.") (citing *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973)). After all, there is no plausible reason to single out one business or individual to bear the burden of remedying a perceived societal problem of broad, generalized import (*e.g.*, relieving poverty amongst the working poor), absent any showing that such business or individual has contributed to that perceived problem any differently than any other businesses or individuals may have. Here, of course, no such showing ever has been or could be made.

2. The Ninth Circuit has further deepened the split of authority amongst the Circuits over what is relevant to proving a "class of one" claim that has progressed beyond the pleading stage. It has done so by dismissing as "entirely irrelevant" the record evidence of improper legislative motive in this case. *See* Pet. App. 37a-41a (Judge Bybee's summary of the record evidence of Berkeley enacting its challenged Amendment in order to pressure RUI into becoming a union restaurant).

The Seventh Circuit recently has held that evidence of an actual, improper motive *is* relevant to a "class of one" equal protection claim — even without the application of any kind of heightened scrutiny of such a claim.[5] *See McDonald v.*

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[5] In doing so, the Seventh Circuit has adopted the view expressed in Justice Breyer's separate concurrence in *Village of Willowbrook*, which "drew no direct response from his colleagues." *Bell v. Duperrault*, 367 F.3d 703, 710 (7th Cir. 2004) (Posner, J., concurring). Judge Posner aptly observed that "[t]heir silence requires interpretation." *Id.*

Addressing the concern that allowing allegations of "ill will" to be relevant to "class of one" equal protection claims "would transform many ordinary violations of city or state law into violations of the Constitution," 528 U.S. at 565, Justice Breyer reasoned

Vill. of Winnetka, 371 F.3d 992, 1002 n.3 (7th Cir. 2004) ("In an equal protection 'class of one' claim based on 'totally illegitimate animus,' the victim alleges disparate treatment because he was disliked by the defendant, presumably on account of prior dealings." (citation omitted)); *Ritzel v. Milwaukee County*, No. 03-2062, 2004 U.S. App. LEXIS 12826, at *2-3 (7th Cir. June 23, 2004) ("We have emphasized that a complained-of governmental act must have been based on some sort of personal animus." (citing *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000), *cert. denied*, 531 U.S. 1080 (2001))); *see also Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995) (noting that a "class of one" claim is appropriate where a "powerful public official picked on a person out of sheer vindictiveness").[6] The Ninth Circuit's decision below — holding that allegations of improper legislative motive are "entirely irrelevant" — directly conflicts with the foregoing decisions of the Seventh Circuit.

[Footnote continued from previous page]

that allegations of "'vindictive action,' 'illegitimate animus,' or 'ill will'" are sufficient to mitigate the risk that a constitutional issue would be unnecessarily reached or that rational basis review would operate to limit excessively the scope of the State's legitimate regulatory authority. *Id.* at 565-66.

[6] Indeed, some Seventh Circuit decisions have read *Village of Willowbrook* as allowing for allegations of "ill will" to constitute an alternative method — wholly separate from the traditional "intentional and irrational" test — of proving an equal protection violation. *See, e.g.*, *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001) ("Under our circuit precedent, an individual also may state a claim under the Equal Protection Clause if he can show that state government took an action that 'was a spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective.'" (citation omitted)); *cf. Olech v. Village of Willowbrook*, No. 97 C 4935, 2002 U.S. Dist. LEXIS 19577, at *51 (N.D. Ill. Oct. 10, 2002) (stating willingness to analyze evidence "under either a traditional irrational basis/intent test . . . or under an 'ill will' theory — whether as a necessary part of a core equal protection claim (as stated in *Hilton*), or as an alternative theory (as stated in *Albiero*).").

The Ninth Circuit's decision also conflicts with the decisions of other Circuits that have held that evidence of improper legislative motive is relevant to proving a "class of one" equal protection violation. *See, e.g.*, *Donovan v. City of Haverhill*, 311 F.3d 74, 77 (1st Cir. 2002) (considering "bad faith" and "malicious intent" in the denial of a permit to move a house on a public road); *DeMuria v. Hawkes*, 328 F.3d 704, 707 (2d Cir. 2003) ("Although their complaint does not actually use the word 'irrational,' as Olech's did, the allegation of an impermissible motive and of animus is sufficient to establish an equal protection issue." (citing *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 500 (2d Cir. 2001))); *Shipp v. McMahon*, 234 F.3d 907, 916 (5th Cir. 2000) ("To state a claim sufficient for relief, a single plaintiff must allege that an *illegitimate animus or ill-will motivated* her intentionally different treatment from others similarly situated and that no rational basis existed for such treatment." (emphasis added)), *cert. denied*, 532 U.S. 1052 (2001); *cf. also LaTrieste Restaurant & Cabaret Inc. v. Vill. of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994) (holding that an equal protection claim is stated by alleging selective treatment plus "malicious or bad faith intent to injure a person" (quoting *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980))).

Judge Posner articulated the circuit split on the relevance of improper legislative motive to "class of one" claims under this Court's decision in *Village of Willowbrook*, in the following terms:

> Some cases from other circuits merely repeat the formula recited by the Supreme Court majority in *Olech*. *Cobb v. Pozzi*, 363 F.3d 89, No. 02-7218, 2004 WL 736799, at *18 (2d Cir. Apr. 2, 2004); *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 439-40 (4th Cir. 2002); *Costello v. Mitchell Public School Dist. 79*, 266 F.3d 916, 921-22 (8th Cir. 2001). Others, however, pin their flag to "reasons of a personal nature," or some variant, and are thus like *Hilton* [*v. City of Wheeling*, 209

> F.3d 1005, 1008 (7th Cir. 2000)]. *Williams v. Pryor*, 240 F.3d 944, 951 (11th Cir. 2001); *Shipp v. McMahon*, 234 F.3d 907, 916-17 (5th Cir. 2000), overruled on other grounds in *McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002); *Bryan v. City of Madison*, 213 F.3d 267, 276-77 and n.17 (5th Cir. 2000). Still others consider the question whether after *Olech* a personal motive is required an open one. *Hayut v. State University of New York*, 352 F.3d 733, 754 n. 15 (2d Cir. 2003); *DeMuria v. Hawkes*, 328 F.3d 704, 707 n. 2 (2d Cir. 2003); *Giordano v. City of New York*, 274 F.3d 740, 743 (2d Cir. 2001); *cf. Bartell v. Aurora Public Schools*, 263 F.3d 1143, 1149 (10th Cir. 2001). Only one decision is explicit that proof of personal motive is *not* required, *Jackson v. Burke*, 256 F.3d 93, 96-97 (2d Cir. 2001) (per curiam) — and the court that decided it later described the assertion as "dicta" and, consistent with other Second Circuit decisions that we have cited, described the question whether a personal motive is required as open. *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 499-500 (2d Cir. 2001).

Bell, 367 F.3d at 711 (Posner, J., concurring); *see also id.* at 709 (citing numerous academic commentators discussing the lack of clarity on the issue, *e.g.*, Robert C. Farrell, *Classes, Persons, Equal Protection, and* Village of Willowbrook v. Olech, 78 WASH. L. REV. 367, 400-25 (2003)); *but see also Wojcik v. Mass. State Lottery Comm'n*, 300 F.3d 92, 104 (1st Cir. 2002) ("An equal protection claim will *only* succeed if the decision to treat an individual differently than those similarly situated is wholly 'arbitrary or irrational.'" (emphasis added)).

The Ninth Circuit's refusal to accord *any* legal significance to the record evidence of improper motive on the part of Berkeley officials in this case (see Pet. App. 12a-13a, 40a-41a) effectively aligns the Ninth Circuit with some decisions of the Second Circuit, but against the Fifth, Seventh, Tenth,

and Eleventh Circuits, and most decisions of the First and Second Circuits.

It also conflicts with this Court's holdings in *Romer v. Evans* and *City of Cleburne v. Cleburne Living Center, Inc.* that legislative classifications cannot be upheld under rational basis scrutiny where the classification's enactment can only be explained in terms of mere animus or other improper legislative motives. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (the "sheer breadth" of the challenged law "is so discontinuous with the reasons offered for it that the [law] seems inexplicable by anything but animus toward the class it affects"); *Cleburne*, 473 U.S. at 446-47 ("some objectives — such as 'a bare . . . desire to harm a politically unpopular group,' . . . — are not legitimate state objectives").

This Court should therefore grant certiorari to clarify the methods of proof appropriate to a "class of one" equal protection claim and to resolve the circuit split on the relevance of improper legislative motive.

3. The Ninth Circuit panel majority's rejection of any "class of one" equal protection claim by RUI based on RUI's supposed lack of "vulnerability" also conflicts with the decisions of this Court and of the Seventh Circuit.

The majority below held that even though "classifications should be scrutinized more carefully the smaller and more vulnerable the class is," Pet. App. 31a-32a (citing *SeaRiver Mar. Fin. Holdings Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002)), a "number of large businesses that occupy and profit from prime real estate *can hardly be considered vulnerable*. Thus, RUI's claim does not merit any special treatment." *Id.* (emphasis added).

Nothing in the Supreme Court's *Village of Willowbrook* opinion, however, suggests that the "class of one" plaintiff there was any more "vulnerable" than any of her fellow villagers in Willowbrook. Nor is there anything in the Court's opinion that suggests, more generally, that the availability, or the extent of judicial scrutiny, of a "class of one" equal protection claim depends upon the claimant's "vulnerability."

The Seventh Circuit has rejected the Ninth Circuit panel majority's premise that a "class of one" plaintiff must be sufficiently "vulnerable" in order to state a viable equal protection claim. In *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), the court noted, simply, that "[a] class of one is likely to be the most vulnerable of all." *Id.* at 180. A "class of one," in other words, is vulnerable *by definition*. Subsequent Seventh Circuit decisions have followed suit, never questioning whether a plaintiff was sufficiently "vulnerable" to fall within the ambit of the Equal Protection Clause. *See, e.g.*, *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004); *LC&S, Inc. v. Warren County Area Planning Comm'n*, 244 F.3d 601, 602 (7th Cir. 2001); *Indiana State Teachers Ass'n v. Bd. of Sch. Comm'rs*, 101 F.3d 1179, 1181-82 (7th Cir. 1996) (holding that "the equal protection clause can be brought into play as a protection against allowing the government to single out a hapless individual, *firm, or other entity* for unfavorable treatment" (emphasis added)). In *Bell v. Duperrault*, Judge Posner explained in his concurrence that "the unequal treatment . . . of" the coal company that was held to violate the Equal Protection Clause in *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989),

> is either vicious or exploitative (or frequently both), and the fundamental insight of the class-of-one cases is that vicious or exploitative discrimination can sometimes be found even when the victim does not belong to a group that is a familiar target of such treatment. Indeed, a lone victim picked out for social or economic oppression or extinction can be especially vulnerable. . . . Unlike the member of even a minority group, he has no allies at all.

367 F.3d at 712. In other words, the Seventh Circuit's decisions have indicated that a "class of one" is considered *per se* vulnerable for purposes of the Equal Protection Clause. The Ninth Circuit's off-handed dismissal of RUI's "class of one" claim based on RUI's supposed lack of vulnerability cannot

be reconciled with these Seventh Circuit decisions.[7] Review by this Court is thus warranted.

4. There is no support in this Court's jurisprudence for the Ninth Circuit panel majority's dangerous leap in logic from the proposition that a municipality may legislate incrementally, "'one step at a time,'" to the notion that it may legislate against one single business at a time, absent any showing that that business has contributed any differently than other businesses to the broad, generalized problem or policy objective that the municipality ostensibly is addressing. Pet. App. 31a-33a. Indeed, the Court frequently has warned of the dangers of such legislative singling-out. *See supra,* at 7-9. Every decision of this Court relied upon by the panel majority for this leap of logic, and every other decision applying the panel majority's highly deferential review of legislative classifications of which undersigned counsel is aware, addressed the very different context of laws of *general applicability*, in which the ordinary operation of the political process can be trusted to guard against arbitrary and unreasonable laws — even when the legislature approaches a perceived problem incrementally. *See, e.g.*, *Allegheny Pittsburgh Coal*, 488 U.S. at 344 n.4 (distinguishing situations in which the law of a State is "generally applied"). In *FCC v. Beach Communications*, for example, this Court upheld an Act of Congress that treated all "facilities that serve separately owned and managed buildings" differently than all facilities "that serve one or more buildings under common ownership

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[7] Even assuming *arguendo* that the Amendment targeted "a number of large businesses that occupy and profit from prime real estate," the Ninth Circuit panel majority's view that RUI was not "vulnerable" for purposes of a "class of one" equal protection claim cannot be reconciled with this Court's decision in *Allegheny Pittsburgh Coal.* Pet. App. 32a. Here, RUI is no different than the coal company in *Allegheny Pittsburgh Coal* for "class of one" equal protection purposes: it too is locked into a particular geographical location and jurisdiction (the Berkeley marina), through a long-term lease (with Berkeley) for at least the next fourteen years.

or management," for purposes of cable-television franchise regulation. 508 U.S. at 309.[8]

Not only is Berkeley's Amendment not a law of general applicability, but also there never has been any finding or reason given by Berkeley — or any conceivable one — for singling out RUI to bear the burden of complying immediately, and without the opportunity to negotiate offsetting adjustments to, Berkeley's "living wage" ordinance. There is nothing to suggest that Berkeley thought, or had any reason to think, that the problem of poverty amongst the working poor was "most acute" amongst RUI's employees. Pet. App. 8a-9a, 29a-31a. Consequently, "'the relationship of the classification'" created by the Amendment (RUI's employees) "'to [this] goal is . . . so attenuated as to render the distinction arbitrary or irrational.'" *Fitzgerald*, 539 U.S. at 107 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)). Here, the only other purposes asserted by Berkeley in support of its Amendment relate solely to the Marina's "unique location and amenities," and the "considerable sums" that Berkeley

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[8] *See also, e.g.*, *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103 (2003) (Iowa law taxing slot machine revenues from all racetracks at a uniform rate different than the rate applicable to all riverboats); *Nordlinger v. Hahn*, 505 U.S. 1, 5 (1992) (California's constitutional provision implementing an "'acquisition-value' system of taxation" of real property that had the effect of creating differential tax burdens on newer and older homeowners in California generally); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980) (federal law that preserved windfall benefits for all retirees who had become entitled to such benefits while still employed in the railroad industry, but ending such benefits for all other workers); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (New Orleans ordinance that generally prohibited all pushcart vendors, including plaintiff, from operating in the French Quarter, but grandfathering in all vendors that had continuously operated the same business for eight or more years); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 486 (1955) (seemingly overinclusive Oklahoma law that prohibited all "optician[s] from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist").

has spent to maintain the Marina "as an attractive and pleasant location." Pet. App. 29a-30a (quoting Berkeley's "Findings" in support of its Amendment). However, these reasons pertain to the value of RUI's leasehold itself. All of the "benefits [RUI receives] from the City in the form of improvements and lack of competition," *id.* at 32a, are precisely what RUI already has been paying for under its lease with Berkeley.

If Berkeley's rationale can be said to be rationally related to the Amendment, then receiving a bargained-for benefit would be rationally related to *any and every obligation* Berkeley or any other municipality might choose to impose on lessees such as RUI. There is no limit, under the Ninth Circuit's reasoning, on the latitude of municipalities unilaterally to impose, through narrowly targeted "legislation," exactions and obligations on their lessees or others locked into long-term municipal contracts. In this case, Berkeley's imposition on RUI, a single business entity that (1) never was alleged to have uniquely contributed to the problem of poverty amongst the working poor, (2) already has paid for the benefits of its leasehold location, and (3) found itself subject to a long-term municipal lease and targeted by Berkeley and the Union for remaining a non-union restaurant, is arbitrary and violative of the Equal Protection Clause.

II. THE NINTH CIRCUIT'S CONTRACT CLAUSE RULING ALSO CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS IN A MANNER THAT WARRANTS REVIEW BY THIS COURT

The divided Ninth Circuit panel below misapplied and disregarded this Court's and other courts' Contract Clause decisions to such an extent, and in such a significant manner, as to warrant review by this Court. By giving *carte blanche* to municipalities unilaterally to rewrite leases and other contracts to which they are a party, through the expedient of "legislating" against individual businesses (particularly businesses locked into long-term municipal contracts such as

RUI), one business at a time, the panel majority has set a dangerous precedent. As Judge Bybee explained in his dissent, "[u]nder the majority's holding, contractual silence authorizes a municipality to impose additional terms on particular contracting parties — so long as the municipality cloaks the additional requirements in the form of a legislative enactment." Pet. App. 65a. Here, for example:

> The Marina Amendment . . . reduced RUI's expected profits by imposing additional operating costs on RUI. Although RUI is not entitled to any particular rate of return or level of profits under its lease, it might have negotiated differently Berkeley's share of the gross receipts had it known of the Marina Amendment. As in any commercial transaction, RUI values the lease for its expectation, the amount of profits it anticipates from operating a restaurant at the Marina. By requiring that RUI pay higher wages, more generous benefits, and potentially higher rent, the Marina Amendment raises the cost of operating the restaurant, and consequently, reduces the value of the lease to RUI. From RUI's perspective, the Marina Amendment is tantamount to an increase in the rent due to Berkeley.

Id. at 47a-48a.

The Ninth Circuit panel majority's holding runs afoul of the Contract Clause because:

> The Contract Clause's protections cannot be so easily circumvented by faulting RUI for failing to negotiate "specific terms" regarding matters it could not have anticipated. If that were so, then nothing would prevent Berkeley-the-sovereign from requiring RUI to hang new signage, redecorate its dining room, or do anything else that Berkeley-the-market-participant "forgot" to include in its lease. Even worse, Berkeley could legislate terms that it attempted, but failed, to negotiate. Had RUI and Berkeley not reached agreement on the grease trap,

> the majority would allow Berkeley to enact a grease trap ordinance directed at RUI. Under the principle adopted by the majority, there is no end to the terms that Berkeley might legislatively rewrite, so long as they are not covered by "specific terms" in the lease.

Pet. App. 47a; *see also id.* at 65a ("The majority's opinion provides financially troubled governments with the license to extract more stringent terms from public employees whose collective bargaining agreements necessarily lack express terms on every aspect of the employment relationship.").

1. As Judge Bybee correctly explained, "[B]ecause the Marina Amendment is neither generally nor prospectively applicable, . . . it is not a valid exercise of police power and . . . contravenes the Contract Clause." Pet. App. 55a; *see also id.* at 53a ("If Berkeley had raised the minimum wage through a law of general applicability, RUI would not have cause to complain based on contractual silence in the lease. But that is precisely the problem here. The Marina Amendment is not a law of general applicability."). This Court's precedents make clear that the principle of generality is "well rooted in our broader understandings of the Constitution as designed in part to control the 'mischiefs of faction.'" *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1072 (1992) (Stevens, J., dissenting) (citing The Federalist No. 10, p. 43 (G. Wills ed. 1982) (J. Madison)).

This Court's early Contract Clause decisions established the Clause as an important limitation on selective legislation designed to evade a state or local government's existing contractual obligations. Then, as now, a State's legislative power may not be used to renegotiate contractual bargains. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (legislative attempt to rescind land grants) (cited in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 (1977)); *Trs. of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (legislative attempt to amend private contract). Specifically, these early cases focused on the precise problem here — selective and arbitrary legislation tar-

geting a single private entity. *See generally* Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 289 (1988). Since then, this Court has continued to distinguish "generally applicable rule[s] of conduct," *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191-92 (1983), that remedy "broad, generalized economic or social problem[s]," *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978), from laws that have "a very narrow focus" and are "aimed at specific" parties. *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 n.13 (1983).[9]

The Amendment falls into the latter category. It retroactively applies to RUI and does not, in practical effect, apply to any other lessee on the Marina or anywhere else in Berkeley. The Amendment is thus the prototypical kind of "special interest" legislation targeting a single entity for discriminatory treatment. If a law applies only to "[a] relatively small number of persons," *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U.S. 441, 445-46 (1915), there is a danger that the legislature acted less out of

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[9] *Compare Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 407-08 (1983) (rejecting Contract Clause challenge to a generally applicable price control on the intrastate natural gas market); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 192 (1983) (rejecting Contract Clause challenge to a generally applicable tax on oil and gas extracted from state wells); *and Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444-47 (1934) (rejecting Contract Clause challenge to a generally applicable mortgage moratorium law); *with Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978) (granting Contract Clause remedy against Minnesota's assessment of a pension funding charge against the plaintiff); *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977) (granting Contract Clause remedy against legislatures' impairment of Port Authority bonds); *and Trs. of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (granting Contract Clause remedy against the State's purported amendment of the university's charter).

a concern for the general good than for special (or even its own) interests. As Judge Bybee observed, RUI is the only principal leaseholder subject to the LWO, and RUI is the only leaseholder in Berkeley that is required to pay the higher wages mandated by the Amendment. Pet. App. 53a. This distinguishes the instant case from a broad-based challenge to minimum wage laws — or to the LWO itself. "The Marina Amendment is not a law of general applicability." *Id.*

What the Amendment is most analogous to is the Minnesota statute imposing a pension funding charge on select employers that this Court struck down in *Allied Structural Steel Co. v. Spannaus*. 438 U.S. 234 (1978). In *Spannaus*, this Court held that that statute impaired the contracts between employers and employees because it did not serve a "broad, generalized economic or social problem," but rather was aimed at specific employers. *Id.* at 250. The law at issue had, similarly to the Amendment here, "substantially altered [contractual] relationships by superimposing pension obligations upon the company *conspicuously beyond those that it had voluntarily agreed to undertake*." *Id.* at 240 (emphasis added). Despite the interest asserted by the State "in protecting the economic welfare of its older citizens, as well as their surrounding economic communities," *id.* at 249 n.22, the narrow focus of the law in *Spannaus* proved fatal under the Contract Clause:

> The State had not acted to meet an important general social problem. The pension statute had a very narrow focus: it was aimed at specific employers. Indeed, it even may have been directed at one particular employer planning to terminate its pension plan when its collective-bargaining agreement expired.

Energy Reserves, 459 U.S. at 412 n.13 (citing *Spannaus*, 438 U.S. at 247-48 & n.20). In the instant case, the facts of "singling out" are even more stark: Berkeley's Amendment applies to a narrower class of businesses, and it impairs a contractual relationship to which the City itself is a party. *See*

also Harmelin v. Michigan, 501 U.S. 957, 978 (1991) ("As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.") (citing *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 25-26 (1977)); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983) (distinguishing a "generally applicable rule of conduct" that advances broad societal interests from "a rule limited in effect to contractual obligations or remedies").

2. The Ninth Circuit panel majority erred in applying this Court's decision in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), which it interpreted to require a "contractual agreement regarding the *specific* . . . terms allegedly at issue." Pet. App. 15a (emphasis added) (quoting *Romein*, 503 U.S. at 187).

Romein is inapplicable to the instant case, because it involved a generally applicable law.[10] This Court in *Romein* underscored the importance of generally applicable legislation in its decision:

> Since at least 1974, workers' compensation law in Michigan has been the subject of legislative study and bitter debate. . . . "Literally dozens of conflicting legislative proposals" were offered each year, and all were fought to a standstill by competing interest groups. . . . The legislative logjam was finally broken in 1980, when the Governor and four legislative leaders began a series of negotiations leading to an agreement on reforms.

503 U.S. at 183. Generally applicable legislation results in the broad mobilization of political actors, and is thus much less likely to infringe upon constitutional rights, because the ordinary operation of the political process guards against

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[10] *See* 503 U.S. at 184 ("In 1981, the legislature enacted a statute allowing employers to decrease worker's compensation benefits to those disabled employees eligible to receive wage-loss compensation from other employer-funded sources.").

such infringement. The integrity of the political process, in other words, lends a degree of trustworthiness in such circumstances. *See supra,* at 8-9, 22-25.

This Court should therefore grant review to clarify the extent, if any, to which *Romein* applies, or needs to be modified, in cases in which a municipality has enacted legislation that imposes new obligations *exclusively* upon a single municipal lessee.

3. The divided Ninth Circuit panel's ruling also cannot be reconciled with the Ninth Circuit's own precedents.[11] Nor can the panel majority's Contract Clause analysis be reconciled with the very terms of the contract at issue here.[12]

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[11] *See, e.g., S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 891 (9th Cir. 2003) (finding a Contract Clause violation, even though there was no specific term in the franchise agreement stating that no additional fees would be charged for "trench cutting"; instead, it was enough that "[o]ther than the [agreed-to] franchise fee in section 3, *no provision of the 1938 Franchise requires payment of any fees* as a condition of the Gas Company's exercise of its rights" (emphasis added)); *Air Cal, Inc. v. City & County of San Francisco*, 865 F.2d 1112, 1115 (9th Cir. 1989) (holding that where, as here, the contract contained a provision allowing the business to hire employees, "the Airlines were granted at least an implied right to select employees and to negotiate as to their rates of compensation," because the contract language giving the airlines the right "to hire" employees contemplates both a "selection" and a "payment" component).

[12] The Amendment's imposition of higher labor costs substantially impairs several express lease terms, including RUI's rights to: "maintain adequate personnel" and pay nondiscriminatory "rates of pay or other forms of compensation"; to "maintain and operate . . . a major first-class restaurant and cocktail lounge"; to "employ its best judgment, efforts and abilities to operate the business in a manner calculated to produce the maximum profitable volume of sales, rents and transactions maintainable"; and to assess only charges that are "reasonable and consistent with charges for similar merchandise or services or use of facilities by similar enterprises in the San Francisco Bay Area." Pet. App. 13a, 62a; ER 60-61, 68.

The Ninth Circuit's decision gives free rein to municipalities to supplement their contractual arrangements with unilateral legislative enactments. *But cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994) (recognizing that "contractual or property rights" are "matters in which predictability and stability are of prime importance"). It thus warrants review by this Court.

CONCLUSION

This Court should grant the instant petition for a writ of certiorari and set this case for plenary consideration, to make clear that a municipality does not have "virtually unreviewable" discretion retroactively to rewrite its contract with an individual business under the guise of legislating incrementally, based on nothing more than a highly attenuated relationship to a broad, generalized social objective, and irrespective of evidence of improper legislative motive.

Respectfully submitted.

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October 28, 2004

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUI ONE CORPORATION, a Washington corporation, *Plaintiff-Appellant,* v. CITY OF BERKELEY, *Defendant-Appellee,* HOTEL EMPLOYEES & RESTAURANT EMPLOYEES UNION LOCAL 2850, *Defendant-Intervenor-Appellee.*	No. 02-15762 D.C. No. CV-00-03878-SI OPINION

United States Court of Appeals, Ninth Circuit

Argued and Submitted June 11, 2003

Filed June 16, 2004

Before Susan P. Graber, Kim McLane Wardlaw, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Wardlaw;
Dissent by Judge Bybee

COUNSEL

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OPINION

WARDLAW, Circuit Judge:

As the cost of living skyrockets around the country, and in the San Francisco Bay Area in particular, the face of American poverty is changing dramatically. More and more frequently, full-time, minimum-wage workers are unable to support their families' basic needs. *See* Jim Newton, *L.A.'s Growing Pay Gap Looms as Political Issue Poverty*, L.A. Times, Sept. 7, 1999, at A1 ("Today's poverty icon is a working mother, toiling eight hours or more a day at a job that does not pay enough to cover the rent, clothe the baby or provide a life of even minimal comfort."). Recognizing the plight of its own working poor, the City of Berkeley, California, has joined dozens of other cities nationwide to help bridge the gap between federal and state laws setting the minimum wage—the real value of which has decreased over the past few decades—and the costs of modern urban living by enacting "living wage" ordinances. These ordinances require certain employers to pay their employees wages approximating the real cost of living in the locality, which is often significantly higher than the applicable state or federal minimum wage. Although these ordinances routinely exempt smaller or less profitable employers from their coverage, they do increase labor costs for affected employers.

We must decide whether Berkeley's Living Wage Ordinance, Berkeley Ordinance No. 6548-N.S. (2000) (creating Berkeley Municipal Code ch. 13.27), *amended by* Berkeley Ordinance No. 6583-N.S. (2000) ("Marina Amendment"), violates the Contract Clause of the United States Constitution, the Equal Protection Clause of the United States and California Constitutions, or the state and federal Due Process Clauses as an impermissible delegation of legislative power to unions. Reviewing the

constitutionality of the local ordinance de novo, *see 4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1113 (9th Cir. 1999), we hold that Berkeley's Living Wage Ordinance, as amended, survives these constitutional challenges. Accordingly, we affirm the decision of the district court denying RUI One Corporation's ("RUI") summary judgment motion and entering judgment in favor of the City of Berkeley.

I.

A. Minimum Wage Laws and Living Wage Ordinances

Minimum wage legislation was introduced into the American legal scene early in the twentieth century, as part of broader efforts to improve working conditions and regulate the employment of vulnerable groups (e.g., recent immigrants, women, and children). *See generally* William P. Quigley, *'A Fair Day's Pay For a Fair Day's Work': Time to Raise and Index the Minimum Wage*, 27 St. Mary's L.J. 513, 515-29 (1996); *see also id.* at 516 (noting California's 1913 minimum wage statute). Although the United States Supreme Court struck down some of the earliest minimum wage statutes under its now-defunct economic due process analysis, *e.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (minimum wages for women and children in particular industries in Washington, D.C.), it eventually upheld their validity in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding State of Washington's women and minors minimum wage statute), a case now viewed as the death knell of heightened constitutional scrutiny for economic legislation.

The federal government joined in this growing effort, at first unsuccessfully with the National Industrial Recovery Act in 1933, but finally in 1938 with the enactment of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ("FLSA"). *See* Quigley, *supra*, at 521-29. The FLSA explicitly recognized that in setting national minimum wages in certain

industries, it did not intend to usurp the power of states and municipalities to set higher minimum wages, or to set minimum wages in industries not targeted in the FLSA. *See* 29 U.S.C. § 218(a) ("No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter . . . .").

Since its enactment, eleven states, including in this Circuit Alaska, California, Hawaii, Oregon, and Washington, have enacted minimum wage laws setting statewide wages above the federal minimum. *See* United States Dep't of Labor, *Minimum Wage Laws in the States.*[1] Like their federal counterpart, however, these statewide laws contain exemptions for certain industries. *See id.* n.1. Of significance to the question before us, several of these state laws expressly contemplated further wage regulation by individual localities, including in California, whose state constitution grants municipalities broad legislative power. *See* Cal. Const. art. XI, § 7; Cal. Lab. Code § 1205(b) ("Nothing in this part shall be deemed to restrict the exercise of local police powers in a more stringent manner.").

In the 1960s, certain municipalities, including Baltimore, New York City, and Washington, D.C., began enacting minimum wage ordinances, often preceding statewide legislative action. *See McMillen v. Browne*, 200 N.E.2d 546 (N.Y. Ct. App. 1964) (upholding New York City ordinance); *Mayor of Baltimore v. Sitnick*, 255 A.2d 376 (Md. Ct. App. 1969) (Baltimore); D.C. Code Ann. §§ 32-1001 to -1015. More recently, localities around the country, beginning with

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[1] *Available at* http://www.dol.gov/esa/minwage/america.htm.

Baltimore in mid-1996, have begun refocusing their efforts to enact new ordinances, setting wages and employee benefits higher than either federal or state minimums. Localities in California joined this trend within a few years. Currently, such measures are in place in several counties, including Los Angeles, Ventura, and Marin, as well as a number of municipalities, including San Francisco, Pasadena, San Jose, Santa Cruz, Oakland, and, of course, Berkeley.

Unlike their state and federal counterparts, local wage ordinances tend to be more restrictive in scope; rather than setting citywide minimums applicable to all employers, public and private, most cities have chosen a piecemeal approach, targeting only recipients of city contracts or lessees or larger businesses with more employees and higher earnings. *See Santa Monica, Calif., Adopts First 'Living Wage' Law*, Wall St. J., July 26, 2001, at B4 (noting that, unlike most cities, Santa Monica adopted an ordinance targeting certain private employers regardless of city contracts); *see also* Martha Groves, *Backers of Failed 'Living Wage' Vow to Press On*, L.A. Times, Nov. 7, 2002, § 2, at 10 (Santa Monica's ordinance repealed in 2002 via voter initiative). These local ordinances also differ from their federal and state counterparts in that they mandate significantly higher wages and employee benefits from governed employers. *See id.* (noting that Santa Monica's measure would have required businesses to pay employees $10.50 an hour with health benefits or $12.25 without). Their proponents' goals are to allow covered full-time wage-earners to support a family residing in the locality at a subsistence level; it is for this reason that such ordinances are often referred to as "living wage ordinances," rather than

"minimum wage ordinances." *See* ACORN Living Wage Resource Ctr., *Setting a Living Wage Level.*[2]

In part, this rising tide of state and local legislation has developed due to the decline in the real value of both federal and state minimum wages, which have not risen along with inflation or the cost of living. *Compare* United States Dep't of Labor, *Chart of Minimum Wage Values in Constant Dollars*[3] (noting that if the 1968 minimum wage of $1.60 per hour had kept up with inflation, it would be worth approximately $8.00 per hour in 1996 dollars), *with* 29 U.S.C. § 206(a)(1) (current federal minimum wage is $5.15 per hour). States, too, have recently refocused their efforts on the working poor, *e.g.*, Cal. Code Regs. tit. 8, § 11000(2) (raising California's minimum wage to $6.25 per hour in 2001, and to $6.75 per hour, effective January 1, 2002), but have not been able to bridge the gap between the realities of statewide legislation and the high cost of living in certain localities, *see* Heather Boushey et al., *Hardships in America: The Real Story of Working Families* 73 tbl. A4.1 (Econ. Policy Inst. 2001) (estimating the annual subsistence cost of living in San Francisco as $38,431, or $18.47 per hour for full-time employees, and in Oakland as $31,848, or $15.31 per hour).[4] It is against this backdrop that many localities in California and nationwide have enacted living wage ordinances.

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[2] *Available at* http://www.livingwagecampaign.org/wagelevel.php.

[3] *Available at* http://www.dol.gov/dol/esa/public/minwage/main.htm.

[4] *Available at* http://www.epinet.org/books/hardships.pdf.

B. The Berkeley Living Wage Ordinance

The City of Berkeley enacted its living wage ordinance on June 27, 2000. *See* Berkeley Ordinance No. 6548-N.S. (2000). The ordinance mandated minimum hourly wages and employee benefits for certain employers that received some form of financial benefit from the City (e.g, City contract awardees, lessees of City property, City financial aid recipients), and that meet specified criteria (i.e., number of employees, annual revenues). *See id.* § 2 (creating Berkeley Municipal Code § 13.27.030).

Accompanying the ordinance were the City Council's findings explaining the reasoning behind the ordinance. The Council expressed its concern that "far too many people working in Berkeley . . . live below or near the poverty line" and that, therefore, "the privilege of using public property to operate a business enterprise should not be granted to parties that will exacerbate the problems associated with inadequate compensation of workers." *See id.* § 1(d), (g). It further found that the absence of employer-sponsored health insurance plans ultimately results in higher healthcare costs for the City, state, and federal governments. *See id.* § 1(I). Therefore, the City mandated that employers meeting the relevant criteria be required to pay their employees a minimum of $9.75 per hour, unless they do not provide their employees with health benefits, in which case they must pay them a minimum of $11.37 per hour. *See id.* § 2 (creating Berkeley Municipal Code § 13.27.050(A)).

The minimum wages exceeded then and now both the federal and state minimum wage requirements. At the time of the ordinance's enactment, federal law required a minimum wage of $5.15 per hour, 29 U.S.C. § 206(a)(1), and California law required a minimum wage of $5.75 per hour. Since its enactment, California has raised its minimum wage to $6.25 per hour in 2001, and most recently to $6.75 per

hour, effective January 1, 2002. Cal. Code Regs. tit. 8, § 11000(2).

The Ordinance requires employers to provide their employees a minimum of 22 days off per year for vacation, sick leave, or personal necessity, of which at least 12 days were to be paid. *See* Living Wage Ordinance § 2 (creating Berkeley Municipal Code § 13.27.050(B)). It also requires that a provision mandating compliance with its terms be included in every new or amended City contract or lease. *See id.* (creating Berkeley Municipal Code § 13.27.060). It includes a mechanism for receiving employee complaints and a private right of action for employees in county and state courts. *See id.* (creating Berkeley Municipal Code §§ 13.27.090-.100).

Before enacting the living wage ordinance, the City commissioned a feasibility and cost study. The study concluded that the cost of the ordinance on City lessees could be borne in three ways, by: (1) the City, in the form of lower lease revenue upon renegotiation of the leases; (2) the affected employers, in the form of reduced profits; and/or (3) consumers who purchase products or services from the affected businesses, in the form of higher prices. Although all three of these cost-bearing mechanisms would likely be implicated, it was impossible to conclude what the "split" among them would be. *Id.* The study's authors apparently assumed that the living wage ordinance would be implemented for City lessees only upon the renegotiation of their lease contracts.

C. The Marina Amendment

In the latter part of the 19th century, the state Board of Tide Land Commissioners granted tidelands in San Francisco Bay to private parties free of public trust. *See City of Berkeley v. Superior Court*, 606 P.2d 362, 363 (Cal. 1980). Through careful and stringent land use regulation, the City of

Berkeley attempted to ensure that this then-private land would retain its environmental and open space character.

In 1913, the State of California granted 4,388 acres of tidelands to the City of Berkeley to be held in a public trust. *See* Act of June 11, 1913, ch. 347, 1913 Cal. Stat. 45, *amended by* Act of Apr. 24, 1962, ch. 55, 1962 Cal. Stat. 343. The grant provided that these lands be used only for purposes consistent with the trust, including promoting public access to and enjoyment of the waterfront as a natural resource and place of recreation. *City of Berkeley*, 606 P.2d at 365.

After numerous attempts in court by the State of California and the City of Berkeley to declare that the private land was impressed with the public trust, the City eventually persuaded the State to acquire the land and combine it with the public trust lands to form Eastshore State Park. Thus, the Marina is held in the public trust by the City as trustee.[5]

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[5] The doctrine that the public holds the right to tidelands for purposes such as fishing, commerce and navigation originated in Roman law. *City of Berkeley v. Super. Ct. of Alameda County*, 26 Cal. 3d 515, 521 (Sup. Ct. 1980). English common law also developed similar limitations to the rights of private persons over tidelands. *Id.* "After the American Revolution, the people of each state acquired 'absolute right to all . . . navigable waters, and the soils under them, for their own common use . . . .'" *Id.* (quoting *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). *See Shively v. Bowlby*, 152 U.S. 1, 57 (1894) ("At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation . . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the constitution to the United States.").

In the 1960s, the City abandoned a proposal to turn the site into an industrial area and garbage dump, and decided instead to create a marina and recreation area. Over the past several decades, tne City has invested tens of millions of dollars improving the marina area, building public facilities, and creating open spaces, as well as encouraging the public to enjoy these facilities by sponsoring programs and special events. The City also leased some of the land to private entities, such as RUI's predecessor in interest, to operate businesses thereon. Since 1987, however, the City has imposed a moratorium on commercial development in the Marina.

On September 19, 2000, Berkeley's city council amended the living wage ordinance to also cover certain employers in the Berkeley Marina. *See* Berkeley Ordinance No. 6583-N.S. (2000) (amending Berkeley Municipal Code ch. 13.27). The Marina Amendment defines the Marina as "all land held in trust by the City of Berkeley." *Id.* The amendment added "[e]ntities within the boundaries of the Marina Zone which employ six (6) or more employees and generate $350,000 or more in annual gross receipts," to the list of employers required to comply with the minimum wage, leave, and health benefit provisions of the living wage ordinance. *See id.* § 2 (amending Berkeley Municipal Code § 13.27.030). The amendment requires such Marina employers to provide their employees with the higher wages and improved benefits effective immediately, rather than upon the signing of a new lease contract with the City incorporating its terms.[6] The

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[6] The dissent argues that the Marina Amendment "shifts the burden of public assistance programs from the City to RUI and its customers." *Post*, at 1171-72. Nothing in the record supports this supposition. Berkeley does not benefit directly from the ordinance—it is not a "tax" that increases city

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Marina Amendment also encompasses businesses that are not City lessees, including for example mobile food-service vendors or water-based services (e.g., charter boats), and which therefore would not have been covered under the original Living Wage Ordinance.

The amendment was accompanied by City Council findings that: (1) the public interest is served by requiring large Marina employers to pay their employees a living wage because operating a business in the public trust land of the Marina is a privilege, which should not be abused by contributing to the problems associated with inadequate compensation of workers; (2) the City expends considerable resources in maintaining and promoting the Marina, in turn affording Marina businesses significant financial benefits, a reasonable portion of which should be used to provide employees with appropriate wages and benefits; and (3) members of the public who visit the Marina have a limited choice of businesses to patronize in that area, and should not be deterred from visiting the Marina because they do not wish to patronize businesses that do not provide their employees a living wage.[7] *Id.* § 1.

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revenue—so it is inaccurate to characterize Berkeley as a market-participant when it passes an ordinance that dictates employee wages. It is more accurate to characterize the ordinance as an exercise of Berkeley's police power, and most accurate to characterize it as an action by a trustee.

[7] Although the dissent cites additional facts that it states "reveal why the Marina Amendment is an improper exercise of municipal authority," *post*, at 1158, these facts are introduced solely to establish a supposed nefarious motive on behalf of the City Council. Such facts are wholly irrelevant, however, as our analysis of the constitutionality of an ordinance must proceed from the text of the ordinance, not the alleged motives

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D. The RUI Lease

On March 23, 1968, RUI's predecessor in interest, Manning's, Inc., entered into a fifty-year lease (expiring in 2018) with the City for land located on the public-trust tidelands in the Berkeley Marina. The lease agreement required the lessee to "construct, maintain and operate thereon a major first-class restaurant and cocktail lounge for the convenience and promotion of commerce, navigation and fishery in the Berkeley Marina and for no other purpose." The annual rent due the City was the greater of $11,400 or 2.5% of the restaurant's gross receipts (i.e., before the restaurant deducts operating expenses and labor costs). The lease also contained a number of specific provisions, including provisions requiring the lessee to charge its customers reasonable rates consistent with similar establishments in the San Francisco Bay area (the "reasonable rate requirement") and to "employ its best judgment, efforts and abilities" to maximize profits and enhance the reputation of the Berkeley Marina.

The lease was assigned via an intermediary to the Kries-Grundy Corporation in 1969. In turn, the property was subleased by Berkeley Marina Associates, who in turn subleased it to Restaurants Unlimited, Inc. In August of 1996, Restaurants Unlimited, Inc., assigned the lease to its subsidiary, RUI One Corp. The assignment agreement increased the rent for the leased property to 3.0% of the restaurant's gross receipts until June 30, 2007, and 3.3% of

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behind it. *See Golden State Transit Corp. v. City of Los Angeles*, 686 F.2d 758, 761 (9th Cir. 1982) ("It is well settled that a reviewing court 'will not strike down an otherwise constitutional statute on the basis of an allegedly illicit legislative motive.'" (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968))).

the gross receipts thereafter until the end of the lease term in 2018. The lessee also agreed to install a "grease trap" in the restaurant, which according to a letter from the Berkeley City Manager would cost approximately $50,000. At the time of the lease renegotiation, neither the Living Wage Ordinance nor the Marina Amendment had yet been enacted.

E. Procedural History

On October 19, 2000, RUI filed a complaint for declaratory and injunctive relief against the City in the Northern District of California, alleging that the Living Wage Ordinance and Marina Amendment violate the Contract Clause, Equal Protection Clause, and Due Process Clause. Over one year later, the district court permitted the Hotel Employees & Restaurant Employees Union, Local 2850, to intervene on behalf of the City. RUI subsequently moved for summary judgment, alleging *inter alia* that the Marina Amendment was unconstitutional. The district court *sua sponte* granted summary judgment to the City and Local 2850, holding that the ordinance was not unconstitutional. The parties stipulated to judgment, and this appeal followed.

II.

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts." United States Const. art. I, § 10, cl. 1. Although the text of the Contract Clause is "facially absolute," the Supreme Court has long held that "its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934)).

Whether a regulation violates the Contract Clause is governed by a three-step inquiry: "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Id. at* 411

(quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). If this threshold inquiry is met, the court must inquire whether "the State, in justification, [has] a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem," to guarantee that "the State is exercising its police power, rather than providing a benefit to special interests." *Id. at* 411-12 (citation omitted). Finally, the court must inquire "whether the adjustment of 'the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.'" *Id. at* 412-13 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)). "Unless the State itself is a contracting party, 'as is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Id. at* 412-13 (quoting *United States Trust Co.*, 431 U.S. at 22-23) (footnote omitted). Courts defer to a lesser degree when the State is a party to the contract because "the State's self-interest is at stake." *United States Trust Co.*, 431 U.S. at 25-26.

The threshold inquiry—whether the state law "has 'operated as a substantial impairment of a contractual relationship'"—itself has three components: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (quoting *Allied Structural Steel Co.*, 438 U.S. at 244). The first sub-inquiry is not whether any contractual relationship whatsoever exists between the parties, but whether there was a "contractual agreement regarding the specific . . . terms allegedly at issue." *Id. at* 187. It is at this initial phase of the analysis that RUI's claim, like General Motors's claim in *Romein*, fails.

RUI contracted with Berkeley to lease land and operate a restaurant on it. As the dissent acknowledges, *post*, at 1160-61, no specific provision of the lease agreement addresses payment to or employment benefits for RUI's employees. Similarly, in *Romein*, General Motors challenged the effect of a Michigan workers' compensation statute on its employee contracts. *Id.* at 187. The employment contracts, however, "ma[d]e no express mention of workers' compensation benefits," and thus the Supreme Court concluded there was no need to address whether there was a substantial impairment. *Id. at* 187-88.

RUI makes four ultimately unpersuasive arguments in an effort to overcome the Supreme Court's controlling contractual relationship analysis in *Romein.*

A. No specific terms of the lease agreement are impaired by the Marina Amendment.

First, acknowledging that *Romein* controls our decision, RUI argues that the Marina Amendment in fact impairs three specific provisions of the lease agreement: (1) the setting of the annual rent in terms of the restaurant's gross profits (excluding operating and labor costs); (2) the reasonable rate requirement; and (3) the requirement that RUI use its best judgment in managing the restaurant to maximize profits and enhance the reputation of the Berkeley Marina. This argument fails because none of these provisions specifically addresses the wages and benefits that RUI must pay its employees. Moreover, RUI glosses over the fact that the rent provision, calculating rent as a percentage of gross receipts, *before* labor costs are deducted, is not affected by increased wage and benefit costs. Nor does the Marina Amendment affect directly the rates RUI charges or RUI's best judgment. The latter two remain entirely within RUI's control.

B. No "implied" terms of the lease agreement are impaired by the Marina Amendment.

RUI next argues that the Marina Amendment impairs an implied term of the lease agreement. Because the lease agreement contains an integration clause, the lease represents the parties' entire agreement, and there can be no implied terms. The dissent turns this tenet of contract law on its head by insisting that the absence of a specific term as to employee wages and benefits means the parties actually agreed to incorporate RUI's existing pay scale as part of the lease agreement. RUI's then existing pay scale plainly was not a part of the lease agreement and, more importantly, California law precludes this implication. *See* California Practice Guide: Civil Trials and Evidence § 8:3087 (2003) ("An integration clause is an express statement that all prior discussions are superseded by (or 'merged' into) the written agreement."). Thus, any agreements between Berkeley and RUI that were not expressed in the written agreement were presumptively superseded by the written agreement. The dissent's insistence that "silence in this integrated lease contract represents Berkeley's agreement not to interfere in RUI's wage setting," *post*, at 1162, presumably by not passing laws governing wages and benefits, is illogical and without legal support.

While California law will imply non-essential terms, "those implied rights must be closely connected to the express provisions of the contract." *McMillin Scripps N. P'ship v. Royal Ins. Co. of Am.*, 19 Cal. App. 4th 1215, 1220 (Ct. App. 1993). Most damaging to RUI's claim is that the agreement in question is a commercial lease. Employee wages and benefits are not closely connected to the express provisions of the lease agreement and a city's agreement not to adjust wages and benefits would clearly be an essential term that must be expressed.

As for the more specific circumstance of a Contract Clause claim, the *Romein* Court recognized that implied contractual terms can form the basis for a Contract Clause claim, but that "the contracting parties [must] . . . manifest[ ] assent" to such a term, and that such a term must be "so central to the bargained-for exchange between the parties, or to the enforceability of the contract as a whole, that it must be deemed to be a term of the contract." *Id.* at 188-89. RUI neither explains what the implied contract term is, nor shows how Berkeley manifested its assent to that term, nor demonstrates why any such term would be "central to the bargained-for exchange."

In contrast, we have found state statutes and municipal ordinances to impair implied contractual terms substantially when such terms were clearly part of the bargained-for agreement. In *University of Hawaii Professional Assembly v. Cayetano*, for example, Hawaii enacted a "pay lag" statute, authorizing the State unilaterally to postpone the dates on which state employees received their salaries. 183 F.3d 1096, 1099 (9th Cir. 1999). Even though the employees' collective bargaining contract with the state did not contain an explicit term requiring specific payroll dates, we found that twenty-five years of payments on the fifteenth and last days of each month amounted to a "course of dealing," creating an enforceable contractual expectation under Hawaii contract law. *Id.* at 1102.

More recently, we found that the City of Santa Ana's 2001 ordinance imposing a trench-cutting fee substantially interfered with a local utility's right under a 1938 franchise, allowing it to lay pipes under city streets in exchange for a percentage of the utility's profits. *See Southern California Gas v. City of Santa Ana*, 336 F.3d 885, 890 (9th Cir. 2003) (per curiam). Although the 1938 contract did not specifically forbid the city from imposing such fees, we noted that a fair reading of its terms, coupled with years of past practice, conferred on the utility a right to excavate below city streets

and repair any damage it creates in the process—and that the city's bald attempt to increase its revenue by imposing an additional "direct, immediate and measurable [cost, which] affects a central provision of the franchise" was therefore unconstitutional. *Id.* at 892.

RUI has failed to identify any specific implied contractual right it enjoys as a result of its lease agreement with the City that is impaired, substantially or not, by the Marina Amendment. Moreover, to the extent that RUI contends that the lease agreement contains an implied term providing that the City would not enact any ordinances imposing an economic burden upon RUI during the period of the lease, such a contractual term would be void as against public policy. For "'the legislature cannot bargain away the police power of a State.' . . . [T]he Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *United States Trust*, 431 U.S. at 23 (quoting *Stone v. Mississippi*, 101 U.S. 814, 817 (1880)).

> Otherwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements . . . . [As] summarized in Mr. Justice Holmes' well-known dictum: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.'

See id. at 22 (quoting *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)); *see also Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 17 Cal. 3d 785, 800 (Sup. Ct. 1976) ("[I]t is settled that the government may

not contract away its right to exercise the police power in the future.").[8]

The power to regulate wages and employment conditions lies clearly within a state's or a municipality's police power. "'States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples.'" *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976)).

Moreover, the lease agreement contains a provision mandating that RUI "comply with all applicable laws, ordinance[s] and regulations of the City [of Berkeley], County, State and United States Governments." California courts have consistently interpreted such provisions to mean that a party to a contract will "comply with existing as well as future law." *Marina Plaza v. Cal. Coastal Zone Conservation Comm'n*, 140 Cal. Rptr. 725, 732 (Ct. App. 1977); *accord Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 103 Cal. Rptr. 2d 447, 463 (Ct. App. 2001). Thus, contrary to RUI's suggestion, the lease agreement provides that RUI will be subject to regulation that may change with time, not that it is immune from such regulation.

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[8] The same principle holds true with regard to lands, like the land at issue here, held in the public trust. *See Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. Sup. Ct. 1987) ("The state can no more convey or give away [the public trust] interest than it can 'abdicate its police powers in the administration of government and the preservation of the peace.'") (quoting *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 453 (1892)).

Flying in the face of this express "compliance with law" lease term, the dissent makes the hyperbolic argument that there was no reason for RUI to specifically negotiate an exemption from future increases in the minimum wage because RUI could not have anticipated that the City would "effectively rewr[i]te RUI's lease by ordinance." *Post*, at 1163. In support, it asserts that "[t]he Contract Clause protects parties doing business with the government from such arbitrary exercises of sovereign authority," and then offers a lengthy string cite of cases it represents exemplify "such arbitrary exercises of sovereign authority." *Post*, at 1163. None of these cases supports the assertion that the Marina Amendment is such an "arbitrary exercise[] of sovereign authority."[9] In each cited case (except *University of Hawaii*, discussed in detail *supra* p. 1148-49), the newly enacted ordinance directly affected a specific, express term in the government contract.[10] For example, in *Air Cal, Inc. v.*

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9 It is safe to say that neither the majority nor dissent supports "arbitrary exercises of sovereign authority," but surely it is not simply the Contract Clause which protects government contractors from arbitrary acts.

10 In its lengthy string cite of parentheticals, the dissent fails to reference the specific terms of the contracts that the courts found were impaired. *See Southern California Gas*, 336 F.3d at 892 (specific terms providing Gas Company "right to excavate" and right to "repair streets after excavations."); *State of Nevada Employees Ass'n v. Keating*, 903 F.2d 1223, 1225 (9th Cir. 1990) (specific term providing employees the right to "withdraw their [pension] contribution at any time without penalty."); *Continental Illinois National Bank & Trust Co. v. Washington*, 696 F.2d 692, 695 (9th Cir. 1983), *appeal dismissed sub nom., The Don't Bankrupt Washington Committee v. Continental Illinois National Bank & Trust Co.*,

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*City & County of San Fran*cisco, we held that a wage condition in a municipal ordinance impaired the private airlines' leases with the City. 865 F.2d 1112, 1116 (9th Cir. 1989). However, the written leases gave the airlines the right to "hire and train" employees. We reasoned that "the ordinary meaning of the term 'to hire' commonly includes both a 'selection' and 'payment' component." *Id.* at 1115. Therefore, the leases expressly contemplated how the airlines would treat employee's wages and benefits, and the ordinance clearly impaired that specific provision, as in *Romein.*

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460 U.S. 1077 (1983) (specific terms providing *inter alia* that "[State] was 'duly authorized under all applicable laws to create and issue ... bonds,'" ... where such bonds "were revenue bonds to be paid solely from 'income, revenues, receipts and profits derived by ... ownership and operation ... of the project.'"); *Sonoma County Organization of Public Employees v. County of Sonoma*, 152 Cal. Rptr. 903, 905 (1979) (specific term providing "employees represented by the petitioner labor organizations a wage increase ...."); *Interstate Marina Dev. Co. v. County of L. A.*, 202 Cal. Rptr. 377, 382 n.5 (Ct. App. 1984) (specific term providing lessees the right to "sublease portions of the demised premises for a period not to exceed one year ...."); *Associated Builders & Contractors v. Baca*, 769 F. Supp. 1537, 1549 (N.D. Cal. 1991), *aff'd on other grounds sub nom. Chamber of Commerce of the United States v. Bragdon*, 64 F.3d 497, 502 (9th Cir. 1995) (specific term providing wage benefits under collective bargaining agreements); *Ross v. City of Berkeley*, 655 F. Supp. 820, 828 (N.D. Cal. 1987) (specific term providing for a "fixed five-year lease.").

C. No "expected benefits" are impaired by the Marina Amendment.

Third, RUI argues that even if the Marina Amendment does not affect an express or implied term of the lease agreement, it impairs "the very value bargained for" in the agreement. The "value" to which RUI refers is its anticipated net profit from the lease and operation of the restaurant, which it contends the Marina Amendment will reduce. In support, RUI cites two *Lochner*-era Supreme Court cases. *See Ga. Ry. & Power Co. v. Town of Decatur*, 262 U.S. 432, 439 (1923) (holding unconstitutional town's subjection of newly annexed land to its train-ticket price controls); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 230 U.S. 84, 92-93 (1913) (holding unconstitutional city's charging a "rental" fee to utilities laying pipes below city streets). The Court's analysis in these cases, both decided during the heyday of economic due process, has been long superseded by its approach to the Contract Clause developed over the past three decades, subjecting only state statutes that impair a specific (explicit or implicit) contractual provision to constitutional scrutiny.[11] As amici point out, state and local governments routinely impose obligations on resident businesses, compliance with which costs money, which in turn reduces the businesses' profits to the extent of

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[11] The facts in *Boise Artesian* are strikingly similar to those of our recent *Southern California Gas* case, where we invalidated a similarly blatant ordinance, essentially double-charging a utility for a right for which it already paid. *Cf. Boise Artesian*, 230 U.S. at 92-93, *with Southern California Gas*, 336 F.3d 887-88. This does not revive the *Lochner*-era Contract Clause analysis, but instead simply demonstrates how distinct jurisprudential principles can produce the same result in similar cases.

those costs. Compliance with nearly all environmental, workplace-safety, and public-health regulations requires private entities (and often government lessees) to divert resources that could otherwise be realized as profits by their owners. *See* Matea Gold, *Council Deadlocks on Renaming Crenshaw Blvd.*, L.A. Times, June 26, 2003, at B3 (local business owners opposed to renaming thoroughfare after Tom Bradley, Los Angeles's first African-American mayor, due to increased "doing business" costs associated with the address change, e.g., new stationary, cards, signage). Adoption of RUI's rationale would subject all such measures to constitutional scrutiny, an approach the Supreme Court rejected more than half a century ago.

D. That one contracting party is the sovereign does not affect the threshold analysis of whether a specific term in the contract has been impaired.

RUI also argues that because the City is a party to the contract, we should afford less deference to its actions in general, and subject them to more stringent Contract Clause scrutiny. Courts, however, apply a decreased deference for self-interested government acts only upon reaching the third component of the Contract Clause analysis—the inquiry into the government's legislative judgment that the ordinance is reasonable and of appropriate character. *Energy Reserves*, 459 U.S. at 413. We do not reach this inquiry because RUI cannot show that there was any contractual impairment in the first instance.

The dissent disregards the segmented inquiry that the Contract Clause requires, as explained *supra,* at 1147. It would have us examine the government's status as a party in making the threshold inquiry of whether a new law substantially impairs the contract at issue. Our case precedent is clear and contrary to the dissent's views: only once we find that a contract is substantially impaired may we turn to the further questions of legitimate public purpose and

reasonableness. *See Energy Reserves*, 459 U.S. at 413. The government's supposed self-interest is simply not relevant to the factual determinations prerequisite to a finding on this threshold issue—formation, terms and impairment.

Although the dissent cites *Southern California Gas* to support its theory, *Southern California Gas* actually stands for the proposition that a court conducts a self-interest analysis as part of the "reasonable and necessary" inquiry only after concluding that the contract is substantially impaired. 336 F.3d at 894. In *Southern California Gas*, we concluded that a "trench cut" ordinance affected a right-to-repair proviso—a "central[,]" "specifically contracted for provision"—of a prior agreement between the City and a gas company. *Id. at* 892-93. In contrast to the agreement, which allowed the company an opportunity to perform repair work after an excavation and to pay the City for further repairs only if the work was faulty, the ordinance imposed an estimated fee, in advance, regardless of the actual quality of repairs. *Id. at* 893. By saddling the company with "the cost of reimbursing Santa Ana for repairs and the complication of determining the value of such repairs," we concluded that the ordinance "substantially impairs the separate right to repair damage to streets . . . ." *Id.* at 894. Only then did we address the City's self-interest in imposing the ordinance. *Id.* ("Because Santa Ana has substantially impaired its own contract, it has the burden of establishing that the trench cut ordinance is both reasonable and necessary to an important public purpose."). *See also University of Hawaii*, 183 F.3d at 1106-07 (Court conducts self-interest analysis as part of "reasonable and necessary" inquiry, only after concluding that the contract was substantially impaired); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 188-90 (1983) (court first concludes that only one of two provisions at issue impacted contractual obligations, then proceeds to assess the general applicability of the implicated provision in its determination of whether the substantial impact was reasonable and necessary).

For the first time on appeal, RUI also contends that the Marina Amendment violates the implied covenant of good faith and fair dealing in the lease agreement. Because the issue was not raised before the district court, we do not decide it. In any event, this argument would not help RUI's case. California courts have held "unavailing" a party's contention that "the implied covenant of good faith and fair dealing requires the County to exempt [it] from the application of [a subsequently enacted county ordinance]." *Interstate Marina Dev. Co.*, 202 Cal. Rptr. at 388.

The argument that Berkeley impaired RUI's "expected benefit" under the lease is a transparent attempt to resurrect RUI's waived good faith and fair dealing claim. *See, e.g., Johnson v. Mutual Ben. Life Ins. Co.*, 847 F.2d 600, 603 (9th Cir. 1988) ("The implied covenant of good faith and fair dealing requires that neither party to a contract will injure the right of the other to receive the benefits of the agreement.") (quotation omitted). In any event, the good-faith doctrine should not be used to second-guess the actions of a contracting party. "The fact that a discretion-exercising party causes the dependent party to lose some or all of its anticipated benefit from the contract . . . is insufficient to establish a breach of contract by failing to perform in good faith." Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 385 (1980). Accordingly, "courts, mindful that good faith should not be used as a vehicle for judicial fiat, defer to a party who acts with no improper purpose." *Id.* at 384.

The lease agreement provides that RUI will "comply with all applicable ordinance[s] and regulations of the City." Therefore, RUI was on notice that Berkeley could pass future ordinances that might adversely affect RUI's expected benefits under the lease agreement. Furthermore, Berkeley cannot contract out of its police powers or its duties as trustee. *See Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash.

Sup. Ct. 1987) ("The state can no more convey or give away this *jus publicum* interest than it can 'abdicate its police powers in the administration of government and the preservation of the peace.'"). In the absence of proof of subterfuge—and the dissent does no more than speculate, *post*, at 1163—Berkeley's actions do not evince an "improper purpose" that is inconsistent with the terms of the lease agreement. Because Berkeley acted under rights expressly reserved by it in the lease agreement and consistently with its duties as public trustee, RUI has no basis for its allegation of bad faith interference with expected profits.

The dissent would also have us abandon traditional cannons of contractual interpretation to reach the conclusion that silence as to employee wages in a commercial lease agreement somehow creates implied material terms, without telling us what those terms might be. Yet, as the Supreme Court has stated, "[w]e will not strain to reach a constitutional question" through mere speculation. *Exxon*, 462 U.S. at 188 (citation omitted). Not only are commercial leases far removed from the collective bargaining agreements at issue in the cases advanced by the dissent, but there are simply no lease terms, material or otherwise, that are implicated by the Marina Amendment. Thus, "Appellant's Contract Clause challenge . . . fails for the simple reason that there is nothing to suggest that the [law] nullified any contractual obligations of which appellants were the beneficiaries." *Id.*

We therefore conclude that RUI has failed to show that any provision of its lease agreement with the City was impaired, much less substantially impaired, by the Marina Amendment.

Although RUI's Contract Clause claim fails for lack of impairment, we also note that RUI implicitly conceded this claim at oral argument. *See Cmty. Hosp. v. Thompson*, 323

F.3d 782, 789 n.5 (9th Cir. 2003) (dismissing as moot cross-appeal based on party's concession). In response to our questions about the permissible scope of Berkeley's legislative authority, RUI first agreed that local ordinances setting minimum wages and employment benefits greater than those required under applicable federal or state law are permissible. RUI then acknowledged that Berkeley permissibly could have enacted a citywide living wage ordinance requiring all City businesses, or all City lessees, to pay higher wages to their employees, effective on a date certain. The problem with the Marina Amendment was, according to RUI, that it unfairly targeted Marina businesses for immediate implementation of the higher wages, while other Berkeley businesses (with whom RUI competes for customers) were spared payment of the higher wages until their leases with the City expired (at which point they could expect to negotiate a lower rent from the City).

In making this point, RUI assumed that Berkeley's exercise of its police powers to raise employee wages is constitutional, regardless of the existence of preexisting lease agreements or contracts with the affected employers. Thus, RUI's real complaint, as characterized by counsel, is not that the Contract Clause deprives Berkeley of the *power* to have enacted the ordinances in question, but rather that the *manner* in which it chose to exercise that power was unfairly discriminatory toward the class of businesses affected by the Marina Amendment. Because it is only the former question which is a proper subject of Contract Clause analysis, RUI's challenge appears potentially viable only under the Equal Protection Clause, to which we now turn.

III.

RUI argues that the Marina Amendment violates its rights under the Equal Protection Clause, United States Const. amend. XIV, § 1, and Article I, Section 7 of the California Constitution. It claims it was unfairly targeted

when the City expanded coverage of the Living Wage Ordinance to only a handful of employers—between one and five—due to the geographical restrictions, as well as the limitations on the number of employees (more than six) and annual revenue (more than $350,000). The equal protection analysis under the California Constitution is "substantially similar" to analysis under the federal Equal Protection Clause. *See L.A. County v. S. Cal. Tel. Co.*, 196 P.2d 773, 781 (Cal. 1948). Therefore, we must determine whether there is "any reasonably conceivable state of facts that could provide a rational basis for the classification," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993), because this case involves "social and economic policy," and neither targets a suspect class nor impinges upon a fundamental right. "Where there are 'plausible reasons' for [legislative] action, 'our inquiry is at an end.'" *Id.* at 313-14 (quoting *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

In the "Findings" section of the Marina Amendment, the City provided the following reasons for expanding the coverage of the Living Wage Ordinance to the Berkeley Marina:

A. The privilege of using the Public Trust tidelands to operate a revenue-generating enterprise should not be extended to parties that will exacerbate the problems associated with inadequate compensation for workers .... The City also expends considerable sums on the maintenance of the Public Trust tidelands as an attractive and pleasant location for both the public and entities operating therein. Therefore, the public interest is best served by requiring that those parties who operate on Public Trust land pay their employees a living wage; and

B. Employers who operate on Public Trust land enjoy a unique location and amenities which afford

significant financial benefits, a reasonable amount of which should be used to provide employees with a living wage and health care benefits; and

C. Members of the public who visit the Public Trust tidelands have a limited choice of businesses to patronize in that area. The public interest is best served by ensuring that the public is not deterred from visiting the Public Trust tidelands because they do not wish to patronize businesses who do not pay their employees a living wage or provide them with health care benefits.

Marina Amendment § 1.

RUI contends that these were not the real reasons motivating the City Council's decision, but that the City Council was instead motivated by a desire to help in the unionization campaign at a Marina hotel, and that in any case these findings are not supported by any evidence. Furthermore, RUI contends that, to the extent they are legitimate, these rationales for a living wage ordinance existed at the time of the lease renegotiation, and it was therefore improper to act on them afterwards to the detriment of RUI.

These contentions are unpersuasive. According to the Supreme Court, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Communications*, 508 U.S. at 315. The First Circuit has specifically rejected a claim that an environmental ordinance violated the Equal Protection Clause because its challengers alleged that its passage was motivated by a desire to restrict a business's power in dealing with unions. *See Int'l Paper Co. v. Town of Jay*, 928 F.2d 480, 485 (1st Cir. 1991). Furthermore, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach*

Communications, 508 U.S. at 315. A person "attacking the rationality of the legislative classification ha[s] the burden 'to negative every conceivable basis which might support it.'" *Id.* (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)); *see also Fitzgerald v. Racing Ass'n*, 123 S. Ct. 2156, 2160 (2003) ("judicial review is 'at an end' once the court identifies a plausible basis on which the legislature may have relied" (quoting *Fritz*, 449 U.S. at 179)).

The crux of RUI's argument is that it was unfair to target only it and a small number of other businesses in the Marina Amendment. As discussed above, RUI concedes the City's authority to regulate wages, and indeed to enact the original Living Wage Ordinance, but challenges the legislative decision that imposed the ordinance's terms on Marina businesses prior to lease negotiation but not upon other similar businesses elsewhere in the City. Such legislative decisions are "virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Beach Communications*, 508 U.S. at 316. "'[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.'" *Id.* (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)) (finding a rational basis where the state made geographic distinctions to determine tax rates for slot machines).

To the extent that RUI is raising a "class of one" equal protection claim, it fails as well. "A successful equal protection claim may be brought by a 'class of one,' when the plaintiff alleges that it has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *SeaRiver Mar. Fin. Holdings Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002) (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562,

564 (2000) (per curiam)). Even though "'[c]lassifications should be scrutinized more carefully the smaller and more vulnerable the class is,'" *id.* (quoting *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995)), a number of large businesses that occupy and profit from prime real estate can hardly be considered vulnerable. Thus, RUI's claim does not merit any special treatment. It was certainly rational, for the reasons discussed above, for the City to treat larger Marina businesses differently from their competitors outside the Marina.

Finally, RUI observes that the City's stated rationales for the Living Wage Ordinance and the Marina Amendment existed well before these ordinances were enacted, and before the City renegotiated the lease agreement with RUI. Therefore, RUI contends, it was impermissible for the City to act on the basis of those rationales after it had already signed the revised lease agreement. Of course, the City was aware in 1996 that some of its residents suffered due to an inadequate income, that the City expended a great deal of resources on the Marina area, and that members of the public might prefer not to patronize establishments that pay their employees low wages. However, the rational-basis inquiry is a very lenient one, and specifically "attach[es no] legal significance to the timing" of legislative or municipal action. *Bannum, Inc. v. City of Fort Lauderdale*, 157 F.3d 819, 822 n.3 (11th Cir. 1998). Thus, the fact that the City could have enacted the Living Wage Ordinance before the lease renegotiation, or that it could have enacted the Marina Amendment as part of the original Living Wage Ordinance, is without constitutional moment.

We therefore uphold the City's judgment on the basis of the findings it provided. It is more than reasonable that the City should expect Marina businesses, which receive so many benefits from the City in the form of improvements and lack of competition due to the development moratorium, and which operate on land held in the public trust, to

contribute to the welfare of the surrounding community and not to exacerbate its problems. Although RUI claims that any benefit it receives is offset by the rent it pays the City, it is certainly "plausible" for the City legislators to believe that rent alone does not adequately discharge Marina businesses' responsibilities to the public and City. Furthermore, it is certainly "plausible" that certain members of the public might be deterred from patronizing the Berkeley Marina if they knew that the businesses there paid their employees less than a living wage.

IV.

RUI's final claim is that the City of Berkeley deprived it of due process under the United States and California Constitutions. U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7. It claims that by including in the Living Wage Ordinance and the Marina Amendment a provision allowing bona fide collective bargaining agreements to opt out of the ordinance, the City effectively unconstitutionally delegated its legislative power to the unions negotiating these contracts. This argument fails as well.

The defect in RUI's argument is that a provision allowing employees bargaining collectively to opt out of the provisions of a labor regulation is not a delegation of legislative power at all. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) ("An otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection."). Legislative power is "the power to make laws and to alter them at discretion." *Black's Law Dictionary* 911 (7th ed. 1999). Berkeley's city council used its legislative power to enact an ordinance that covered certain businesses and not others—based on geographic location, number of employees, and the presence or absence of a collective bargaining agreement expressly waiving its applicability. Labor unions negotiating collective bargaining

agreements with employers are not legislating, but rather negotiating on behalf of their members; if they reach an agreement with the employer for certain employee benefits and employment conditions that they consider superior to, but incompatible with, the Living Wage Ordinance, the parties can decide to waive its applicability. For example, employees at the Radisson Hotel in the Marina bargained for a pension plan in exchange for hourly wages below the ordinance's rates.

As the Supreme Court has observed in a case determining whether a state labor policy was preempted by federal law, "a number of state and federal laws ... draw distinctions between union and nonunion represented employees," *Livadas v. Bradshaw*, 512 U.S. 107, 131 (1994) (citing 29 U.S.C. § 203(o); D.C. Code Ann. § 36-103 (1993)), in which the content of collective bargaining agreements can affect whether and how a statute applies. The Court referred to these as "familiar and narrowly drawn opt-out provisions." *Id.* at 132; *see also* Cal. Lab. Code § 554 (mandating one rest day per seven day period "unless the collective bargaining agreement expressly provides otherwise").

To support its position, RUI cites yet another *Lochner*-era case, this time one that found an impermissible delegation of legislative power where maximum hours and minimum wages in the mining industry could be set by majority or two-thirds vote of the producers and miners themselves. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936). In that case, the authority to set the hours and wages fell entirely on private parties. Only three years later, however, the Supreme Court found acceptable a statute that required tobacco growers to opt in to its terms by a two-thirds vote. *See Currin v. Wallace*, 306 U.S. 1, 15-16 (1939). The *Currin* Court distinguished *Carter* and explained:

> This is not a case where a group of producers may make the law and force it upon a minority ....

> Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions.

Id. A provision of a statute allowing bona fide collective bargaining agreements to opt out of a statute is similarly not a legislative delegation, but rather simply a "condition of [the ordinance's] application." In the absence of any legislative delegation, RUI's due process argument fails as well.

V.

The decision of the district court rejecting each of RUI's constitutional challenges to the Marina Amendment to the City of Berkeley's Living Wage Ordinance is

AFFIRMED.

BYBEE, Circuit Judge, dissenting:

Laws that work an "impairment of a State's own contracts . . . face more stringent examination under the Contract Clause than [do] laws regulating contractual relationships between private parties . . . ." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n.15 (1978). There is a good reason for this. Parties enter into contracts to "order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Id.* at 245. When the state is a party, there is an additional risk that it will employ its sovereign powers to alter the settled terms of the contract. Although the temptation to secure by legislation what a state has failed to achieve through negotiation is great, the Contract Clause commands that states resist this temptation.

The City of Berkeley succumbed to this temptation by employing its sovereign power to secure terms that it failed to negotiate in its proprietary capacity with RUI. Through the Marina Amendment, the City imposed obligations on a small number of businesses holding long-term contracts with the City (such as RUI) and, moreover, it made these obligations retroactive. The Marina Amendment is, accordingly, a rule of neither general nor prospective applicability. *See Landgraf v. USI Film Products*, 511 U.S. 244, 266-67 & n.20 (1994); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191-92 (1983). Berkeley violated the Contract Clause of the United States Constitution because it has "impair[ed], by legislation, the obligation of its own

contracts." *Woodruff v. Trapnall*, 51 U.S. 190, 207 (1850). I respectfully dissent.[1]

I.

The majority forgoes a factual recitation of how Berkeley passed the Marina Amendment. These facts bear retelling and I recite them, because they reveal why the Marina Amendment is an improper exercise of municipal authority that offends the Contract Clause. After describing how the Marina Amendment substantially impairs RUI's lease, I discuss why the Marina Amendment is not a valid exercise of Berkeley's sovereign power. I then proceed to the analysis that the majority fails to reach, the two additional prongs of the Supreme Court's framework for Contract Clause challenges.

In 1999, the City commissioned a survey of living wage laws in other cities and an economic study of the potential impact in Berkeley of such a provision. The survey found that cities had not adopted a living wage for employers generally. Instead, they had required a living wage as a condition for entering into new municipal contracts or renewing existing ones.[2]

The study of the economic impact of such a policy for Berkeley recognized that a living wage ordinance ("LWO") would raise labor costs. It identified three groups who would

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[1] Because I would find that Berkeley has violated the Contract Clause, I do not reach RUI's equal protection and non-delegation claims.

[2] As the majority opinion notes, Maj. op. at 1142-43, Santa Monica attempted to enforce a living wage ordinance on private employers, whether they had a public contract or not, and the voters repealed the ordinance by referendum.

potentially bear the incidence of these additional costs: (1) the City might receive lower rent revenue when its leases became subject to the LWO because lessees would demand a rent reduction to compensate for the higher labor costs; (2) consumers might have to pay higher prices for the goods and services because businesses subject to the LWO would pass the increased labor costs onto consumers; and (3) employers might realize lower profits because they could not recover all of the higher labor costs through rent reductions or higher prices. The study could not predict precisely what share of the additional costs each of these groups would bear, but warned that "most of the direct costs of a living wage policy will be born by the City of Berkeley." Howard C. Greenwich, *City of Berkeley Living Wage Analysis* 8 (Nov. 30, 1999) ("Greenwich Study").

The Greenwich Study recommended that any LWO cover leaseholders with more than seven employees and gross revenues over $200,000. With respect to how many lessees would be covered, the study observed:

> Although not enough surveys were returned to accurately estimate the financial impact of lessee coverage, it would have a major impact at the Marina. Three leaseholders, a hotel and two restaurants, are major employers of low-wage workers. Because these employers hold long-term ground leases, with the next expiration in 2017, the City should consider requiring a living wage during the next rent negotiating period starting in 2004. The lessees may demand reduced rent if they are required to comply with the living wage ordinance.

Id. The Greenwich Study specifically recommended that the City "consider rent adjustment times for triggering living wage requirements. Otherwise, the three largest businesses [at the Marina] that employ low-wage workers will not be

covered until the year 2017." *Id.* at 32. The three major employers at the Marina were the Radisson hotel; HS Lordships, a restaurant; and Skates, a restaurant owned by RUI.

After receipt of the study, the City Manager wrote a memorandum to the Mayor and City Council stating that the proposed LWO would have no "significant financial impact" on city lessees at the Marina, because these leases "do not have open negotiations for any where from 10-15 years." The memorandum also noted the "proposal from the Living Wage advocacy community" to apply the LWO to Marina employers, but "recommended that any concept of a 'living wage zone' be referred to the City Attorney for further analysis and review." In a second memorandum, the day before the Council voted on the LWO, the City Manager again advised that "[t]hose leases most targeted by the living wage advocates, the Marina leases, do not have open negotiations for anywhere from 10-15 years."

Berkeley adopted the LWO in June 2000. Berkeley, Cal., Ordinance 6548-N.S. (June 27, 2000) (creating Berkeley Municipal Code § 13.27). The LWO does several things. First, the ordinance identifies the employers subject to the LWO. It applies to parties conducting business with Berkeley or receiving some financial benefit from it, such as contractors, licensees, and lessees. The LWO applies only to employers with more than six employees and at least $350,000 in annual revenue. *Id.* § 13.27.030. It also exempts employers "subject to a bona fide collective bargaining agreement where the waiver of the provisions of this Ordinance are [sic] set forth in clear and unambiguous terms in such an agreement." *Id.* § 13.27.070.H. Second, the LWO mandates a scale of minimum hourly wages keyed to the provision of health benefits. It sets the hourly wage at

$9.75/hour for employers that furnish health benefits and at $11.37 for employers that do not.[3] *Id.* § 13.27.050(A). It also requires employers to offer workers twenty-two days off per year for vacation, sick leave, or personal necessity, and at least twelve of which must be paid days. *Id.* § 13.27.050(B). Third, the LWO establishes a private right of action for employees in county and state courts. *Id.* § 13.27.090-.100.

The LWO applies to every city contract or lease as of the date of the agreement with the City or the date when the agreement is amended. *Id.* § 13.27.060. A memorandum from the City Attorney to the City Manager and Department heads issued shortly after the City Council adopted the LWO discussed how to deal with "contracts and leases that were already 'in the pipeline.'" Contracts and leases approved by the City Council after June 20, 2000, and otherwise subject to the LWO, might have to be "re-assemble[d]." The memo noted that "Revising contracts and leases that are actually impacted by the LWO may involve some re-negotiation."

One month later, in July 2000, representatives of Appellee Hotel Employees and Restaurant Employees Union Local 2850 sent two faxes to the City Council urging it to amend the LWO to apply immediately to the Marina lessees. The first asked the Council to "do everything in its power, including restructuring [the City Attorney's] workload if necessary" to make possible a vote on an amendment to the ordinance at a Council meeting in eleven days. It exhorted the Council not to "leave behind . . . the [Marina hotel]

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[3] These amounts represent a 69.6% increase for workers who had health benefits and previously received California's then-prevailing minimum wage, and a 97.7% increase for workers who had no health benefits and previously received California's minimum wage of $5.75. Cal. Code Regs., tit. 8, § 11000(2).

workers, who worked so hard to get [the LWO] passed." The fax included a draft of a proposed amendment that provided: "Notwithstanding any other provision of this Chapter, the compensation requirements of [the LWO] shall become effective for businesses located on public trust lands thirty (30) days after the effective date of this Ordinance." The second fax, sent ten days later, requested that the Council direct the City Attorney to put the amendment in "a form that the City Council can put to a vote" and to clarify its intent to develop an ordinance that will "cover large hospitality employers, particularly those at the Berkeley Marina."

In September 2000, the Council adopted the "Marina Amendment" to the LWO. The Marina Amendment applies to entities within the "Marina Zone" that employ six or more workers and generate $350,000 or more in annual gross receipts. Berkeley, Cal., Ordinance 6583-N.S. (Sept. 19, 2000) (amending Berkeley Municipal Code § 13.27). It defines the Marina Zone to include only lands that Berkeley held in public trust, *id.* § 13.27.020(B), and therefore, it does not reach any employers who were not already conducting business with the City. Although the Marina Amendment does not expressly provide for an effective date, and although the LWO applied prospectively, Berkeley understood the Marina Amendment to apply retroactively to existing leases.

II.

The majority dismisses RUI's claims because it concludes that Berkeley has not impaired any "specific terms" of its lease with RUI. Maj. op. at 1147 (quoting *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)). I respectfully disagree. I would find that Berkeley and RUI have a contract and that the Marina Amendment substantially impaired it. I would then require Berkeley to carry its "burden of establishing that [the law] is both reasonable and necessary to an important public purpose." *S. Cal. Gas Co. v. City of Santa Anna*, 336 F.3d 885, 894 (9th Cir. 2003).

Accord Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12 (1983). In my view, Berkeley cannot satisfy this "heavy burden." *S. Cal. Gas*, 336 F.3d at 896.

A

The majority finds that "[n]o specific provision of the lease agreement addressed payment to or employment benefits for RUI's employees." Maj. op. at 1147. The majority is, of course, formally correct that the lease contains no provision expressly addressing the compensation of RUI's employees. This observation, however, does not end our inquiry.

A broader, and to my mind more common-sense, view of the contract between Berkeley and RUI compels the conclusion that the Marina Amendment affects the agreement the parties reached in 1996 and that the impairment is substantial. *See Romein*, 503 U.S. at 186. The Marina Amendment impaired the lease agreement in at least two ways. First, it violated a general principle of contracts that the agreement between the parties is contained within the four corners of the document. Berkeley could have negotiated with RUI for a living wage in 1996. It did not. Instead, in 2000, upon realizing that RUI's contract could not be renegotiated for some years, Berkeley simply adopted an ordinance directed at the Marina lessees and made it effective immediately. Second, the Marina Amendment reduced RUI's expected profits by imposing additional operating costs on RUI, costs that Berkeley knew were the legitimate subject of negotiation.

1

Federal law controls whether an agreement constitutes a contract for purposes of Contract Clause analysis, although we will "'accord respectful consideration and great weight'" to state contract principles. *Romein*, 503 U.S. at 187

(quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)). Under California law, lease agreements for a period longer than one year must be in writing, CAL. CIV. CODE § 1624(a)(3) (West 2003), and are subject to the "general rules of interpretation applicable to all contracts." *Stockton Theatres, Inc. v. Palermo*, 268 P.2d 799, 801 (Cal. Ct. App. 1954). California requires that "[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . ." CAL. CIV. CODE § 1639 (West 2003). RUI's lease also contained an integration clause, and the inclusion of an integration clause in a written contract precludes subsequent modifications, absent additional writings by the parties. *See Masterson v. Sine*, 436 P.2d 561, 563-64 (Cal. 1968) (an integrated contract is the parties' complete and final agreement); CAL. CIV. CODE § 1698 (West 2003) (permitting modification in writing of a written contract). Furthermore, except as otherwise provided by statute, "[a]ll contracts, whether public or private, are to be interpreted by the same rules . . . ." CAL. CIV. CODE § 1635 (West 2003). California courts have distinguished between government's proprietary and sovereign capacities and held that governments acting in their "proprietary or business capacity" are not entitled to certain rules, defenses, or presumptions to which they are entitled when acting in a sovereign capacity. *Corp. of America v. Durham Mutual Water Co.*, 123 P.2d 81, 83 (Cal. Ct. App. 1942). *Accord M. F. Kemper Constr. Co. v. City of Los Angeles*, 235 P.2d 7, 12 (Cal. 1951).

In 1996, RUI and the City renegotiated the lease agreement when RUI sought the City's approval to assign the lease to a subsidiary, and the City took the position that it could withhold its approval for any reason. The 1996 negotiations were quite specific, and the parties negotiated three new terms. First, Berkeley negotiated for, and obtained, a higher rental payment. Under the original lease, Berkeley was entitled to 2.75% of the lessee's "gross

receipts"; under the new lease it receives 3% of RUI's "gross receipts" until 2007, and 3.3% through the end of the lease in 2018. Second, Berkeley insisted on, and obtained, RUI's agreement to install a new grease trap, at an expected cost of $50,000 to $55,000. Third, Berkeley demanded, and RUI agreed, that RUI would pay $7,000 per year for landscaping.

The lease is silent on the question of RUI's employee wages and benefits. The fact that the lease, which constitutes the entire agreement between the parties, does not set employee wages and benefits necessarily implies that the parties agreed not to contract on wages and benefits.[4] *Cf. Sonoma County Org. of Pub. Employees v. County of Sonoma*, 591 P.2d 1, 7 (Cal. 1979) ("An increase in wages is frequently the very heart of an employment contract; other provisions, including those relating to fringe benefits, are inextricably interwoven with those relating to wages, since employees may surrender various employment benefits in exchange for a wage increase.") Berkeley could have insisted on a wages and benefits provision. Since it did not and since the written contract constitutes the entire agreement of the parties, Berkeley may not later insert an additional term. To the contrary, contractual silence in the presence of an integration clause implies that, absent a generally applicable law, Berkeley promised not to impose unilaterally higher wage and benefits costs on RUI.

If the litigants were both private parties, contractual silence on wages together with an integration clause would clearly prevent the lessor from subsequently altering the bargain they had struck by requiring the lessee to pay some

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[4] RUI's lease does address other employer-employee issues. Paragraph 27 requires, for example, that RUI comply with Berkeley's nondiscrimination policies.

prescribed wage. Because the compensation of the lessee's employees falls outside the scope of the integrated lease agreement, the lessor has no authority to insist the lessee pay some prescribed wage. Similarly, contractual silence on wages in an integrated agreement allows the employer, subject to generally applicable local, state and federal laws, to work out its own arrangements with its employees. In effect, silence in this integrated lease contract represents Berkeley's agreement not to interfere in RUI's wage setting. Noninterference is thus an understood, or implicit term in the contract in the same sense that other unnegotiated terms—covering the signage, the dining room decor, or a gift shop, for example—are similarly left to RUI.

Our court has recognized that the Contract Clause protects such implied contractual terms. For example, in *Univ. of Hawaii Prof'l Assembly v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999) we held that although a collective bargaining agreement governing state employees made no specific mention of dates on which the employees were to be paid, "[a] course of dealing can create a contractual expectation," and that for over twenty-five years, the state had paid its employees on particular days. *Id.* at 1102. The timing of pay days was "material to the terms of employment," "a negotiable matter," and thus an "implicit term[]" of the employment contract. *Id.*

Moreover, Berkeley established a course of dealing with RUI. Berkeley does not allege that it ever, in the more than 30 years that RUI or its predecessor in interest has held a lease at the Marina, previously sought to set the wages its lessees paid their employees. Berkeley's own economic expert acknowledged, and the City Manager explicitly stated, that the LWO could not reach the Marina leases until their terms expired. Berkeley's tacit recognition that it could not alter the terms of existing leases was evident in its applying the original LWO to prospective leases only. The subsequent

Marina Amendment contravened the implicit terms created by its prior course of dealing.

When it adopted the Marina Amendment and applied it to existing leases, the City effectively rewrote RUI's lease by ordinance. As the record plainly shows, Berkeley knew that the Marina Amendment would have an immediate impact on RUI and perhaps two other leaseholders at the Marina. Berkeley used its sovereign authority to achieve what it failed to negotiate in its proprietary capacity.

The Contract Clause protects parties doing business with the government from such arbitrary exercises of sovereign authority, as we and California state courts have recognized.[5]

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[5] *See S. Cal. Gas*, 336 F.3d at 892-93 (Santa Ana "trench cut" ordinance impaired 1938 agreement regarding utility companies payment for excavation); *Univ. of Hawaii Prof'l Assembly*, 183 F.3d at 1104-06 (Hawaii "pay lag" decision impaired implied payroll dates in public employees' collective bargaining agreement); *State of Nevada Employees Ass'n v. Keating*, 903 F.2d 1223, 1227 (9th Cir. 1990) (statute impaired the right of public employees to withdraw their personal contributions); *Air Cal, Inc. v. City & County of San Francisco*, 865 F.2d 1112, 1116 (9th Cir. 1989) (ordinance requiring 19 airlines to pay "prevailing rate of pay" at the airport impaired their leases with the city); *Cont'l Illinois Nat'l Bank & Trust Co. v. Washington*, 696 F.2d 692, 697-701 (9th Cir. 1983), *appeal dismissed sub nom., The Don't Bankrupt Washington Comm. v. Cont'l Illinois Nat'l Bank & Trust Co.*, 460 U.S. 1077 (1983) (Washington voter initiative imposing bond restrictions impaired state contracts with public utility); *Sonoma County Org. of Public Employees*, 591 P.2d at 4 (statute prohibiting paying salary or cost-of-living increases impaired memorandum of understanding with public employees); *Interstate Marina Dev. Co. v. County of Los Angeles*, 202 Cal. Rptr. 377, 381-82 (Cal. Ct. App. 1984)

[Footnote continued on next page]

The Contract Clause's protections cannot be so easily circumvented by faulting RUI for failing to negotiate "specific terms" regarding matters it could not have anticipated. If that were so, then nothing would prevent Berkeley-the-sovereign from requiring RUI to hang new signage, redecorate its dining room, or do anything else that Berkeley-the-market-participant "forgot" to include in its lease. Even worse, Berkeley could legislate terms that it attempted, but failed, to negotiate. Had RUI and Berkeley not reached agreement on the grease trap, the majority would allow Berkeley to enact a grease trap ordinance directed at RUI. Under the principle adopted by the majority, there is no end to the terms that Berkeley might legislatively rewrite, so long as they are not covered by "specific terms" in the lease.

2

The Marina Amendment impaired RUI's lease in a second way: It reduced RUI's expected profits by imposing additional operating costs on RUI. Although RUI is not entitled to any particular rate of return or level of profits under its lease, it might have negotiated differently Berkeley's share of the gross receipts had it known of the Marina Amendment. As in any commercial transaction, RUI values the lease for its expectation, the amount of profits it

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[Footnote continued from previous page]

(ordinance prohibiting termination of marina leases except for specified causes impaired leases). *See also Associated Builders & Contractors v. Baca*, 769 F. Supp. 1537, 1549 (N.D. Cal. 1991), *aff'd on other grounds sub nom. Chamber of Commerce of the United States v. Bragdon*, 64 F.3d 497, 502 (9th Cir. 1995) ("prevailing wage" ordinance impaired private collective bargaining agreement); *Ross v. City of Berkeley*, 655 F. Supp. 820, 828-29 (N.D. Cal. 1987) (commercial rent control ordinance impaired existing private leases).

anticipates from operating a restaurant at the Marina. By requiring that RUI pay higher wages, more generous benefits, and potentially higher rent, the Marina Amendment raises the cost of operating the restaurant, and consequently, reduces the value of the lease to RUI. From RUI's perspective, the Marina Amendment is tantamount to an increase in the rent due to Berkeley.[6] The total cost of leasing a space is a matter "so central to the bargained-for exchange between the parties . . . that it must be deemed a term of the contract." *Romein*, 503 U.S. at 188-89. An increase in RUI's cost of operating Skates is "a severe impairment that defeats the expectations of the parties under the contract." *Cont'l Illinois Nat'l Bank & Trust Co. v. Washington*, 696 F.2d 692, 700 (9th Cir. 1983), *appeal dismissed sub nom., The Don't Bankrupt Washington Comm. v. Cont'l Illinois Nat'l Bank & Trust Co.*, 460 U.S. 1077 (1983).

The majority inexplicably rejects the idea that the value of the lease to RUI is the profit RUI anticipates from operating the restaurant and that the Marina Amendment reduces this value. Maj. op. at 1153-54. Instead, the majority implies that any inquiry beyond the narrowest rendering of the contract risks resurrection of *Lochner v. New York*, 198 U.S. 45 (1905). Our analysis, however, has

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[6] The majority states that "the rent provision, calculating rent as a percentage of gross revenues, *before* labor costs are deducted, is not affected by increased wage and benefit costs." Maj. op. at 1148. This is true in the technical sense that Berkeley receives a fixed percentage of RUI's gross receipts, and the Marina Amendment does not affect the percentage owed. To the extent the majority is implying that Berkeley's rent (as a dollar amount) will not increase as a result of the Marina Amendment, this may not be true, as I discuss *post*, at 1172-73.

nothing to do with substantive economic due process. The Contract Clause addresses legislation that retroactively impairs contracts. The abandoned doctrine of *Lochner* prohibited certain prospective contracts.[7] Unlike the judicially-created doctrine of substantive economic due process, "the Contract Clause remains part of the Constitution." *Spannaus*, 438 U.S. at 241. Consistent with Contract Clause precedents, and contrary to *Lochner*, we do not "engage in a utilitarian comparison of the public benefit and public loss." *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 29 (1977); *cf. Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) ("a constitution is not intended to embody a particular economic theory"). The desirability of living wage laws is thus irrelevant to the Contract Clause question before us. The Contract Clause is a neutral rule that protects workers as well as businesses. *See, e.g., Univ. of Hawaii Prof'l Assembly*, 183 F.3d at 1103; *State of Nevada Employees Ass'n v. Keating*, 903 F.2d 1223, 1228 (9th Cir. 1990); *Sonoma County Org. of Public Employees*, 591 P.2d

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[7] *See* John E. Nowak & Ronald D. Rotunda, 2 TREATISE ON CONSTITUTIONAL LAW 636 (3d ed. 1999) ("During the Marshall years the Court used the provision to invalidate statutes that retroactively impaired almost any contractual obligation of private parties. The Court never used the clause to void laws that prospectively modified contractual obligations."); Michael B. Rappaport, Note, *A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918, 925 (1983) (noting that substantive due process was applied to prospective legislation and arguing the Contract Clause applies only to retrospective legislation). *See also* Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 553 (1987) (distinguishing Contract Clause and substantive due process).

at 11. Moreover, my review of Contract Clause cases in California[8] and other courts[9] reveals that the Clause is invoked most often by public employees to prevent municipal and state governments from reducing their compensation during times of fiscal crisis.

3

To offend the Contract Clause, the impairment must be substantial, *Energy Reserves*, 459 U.S. at 411-12, and the Marina Amendment satisfies this test. RUI estimated that the Marina Amendment will increase its annual labor costs by $121,000 per year, which represents a 22% decrease in its net revenues. Relative to RUI's average annual rent for the preceding three years of roughly $197,000 per year, the increased labor costs represent a 61% increase in the cost to

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8 *See, e.g., Bd. of Admin. v. Wilson*, 52 Cal. App. 4th 1109, 1153-57 (1997); *United Firefighters of Los Angeles County v. City of Los Angeles*, 210 Cal. App. 3d 1095, 1109-1117 (1989); *California Teachers Ass'n v. Cory*, 155 Cal. App. 3d 494, 510-13 (1984); *Valdes v. Cory*, 139 Cal. App. 3d 773, 789-91 (1983).

9 *Ass'n of Surrogates & Supreme Court Reporters v. New York*, 940 F.2d 766, 773-74 (2d Cir. 1991), *modified at* 969 F.2d 1416 (1992); *Andrews v. Anne Arundel County*, 931 F. Supp. 1255, 1264-67 (D. Md. 1996); *Fraternal Order of Police v. District of Columbia*, 1995 U.S. Dist. LEXIS 20951 at 20-42 (D.D.C. 1995); *Marvel v. Danneman*, 490 F. Supp. 170, 175-77 (D. De. 1980); *Christensen v. Minneapolis Municipal Employees Ret. Bd.*, 331 N.W.2d 740, 750-52 (Minn. 1983); *Carmichael v. Workers' Comp. Court*, 234 Mont. 410, 414-15 (1988); *Opinion of the Justices*, 135 N.H. 625, 630-38 (1992); *Cliff v. Blydenberg*, 661 N.Y.S.2d 736, 739-40 (1997); *Oregon State Police Officers' Ass'n v. State*, 323 Ore. 356, 375-76 (1996).

RUI of satisfying its contractual obligations under the lease. The significance of the impairment was also immediately apparent to Berkeley. The City-sponsored Greenwich Study advised that, if applied prospectively, the LWO would prompt potential lessees to insist on lower rents. Whether RUI would have negotiated lower rent in view of the LWO is unknown, because Berkeley imposed the Marina Amendment on RUI's existing lease almost immediately.

The Marina Amendment's cost to RUI, however, was far greater than that of the other provisions that RUI and Berkeley actually negotiated. During the last negotiations of the lease in 1996, Berkeley and RUI bargained over who would bear the $50,000 cost of installing a "grease trap." Even more telling, they bargained over $7,000 in landscaping costs. If the parties perceived that these expenditures were sufficiently material to warrant negotiation, then the Marina Amendment—which could raise labor costs by more than $100,000—is certainly a substantial impairment. Moreover, the City Manager felt these items were substantial enough to warrant writing a detailed report on them to the City Council. Upon completion of the 1996 negotiations, Berkeley's City Manager drafted a memorandum to the Mayor and City Council describing the financial impact of the new lease. He estimated that through 2007, the City would gain an additional $22,000, and from 2007 to the end of the lease in 2018, Berkeley would gain an additional $27,000. All of these amounts pale in comparison to the expected cost to RUI of the Marina Amendment.

One of Berkeley's expert witnesses, a CPA, examined RUI's books and testified that the "cost of compliance with the Living Wage Ordinance is not so significant or so adverse as to cause Skates restaurant to close its doors and does not threaten its viability." Perhaps that is the case, but the expert's thesis is so modest that it renders his statement irrelevant. "Total destruction of contractual expectations is not necessary for a finding of substantial impairment," *U.S.*

Trust, 431 U.S. at 26-27, and "[e]ven adjustments in implicit financial terms can constitute substantial impairment." *S. Cal. Gas*, 336 F.3d at 890. Whether measured in expected profits or in terms of how the parties actually responded, the Marina Amendment's impairment of RUI's lease is substantial.

4

The majority believes that because Berkeley could have passed a generally and prospectively applicable ordinance that, like a minimum wage law, set compensation and benefits above the amounts required by state and federal law, the Marina Amendment is necessarily a valid exercise of Berkeley's police power. Maj. op. at 1153-54. "[T]he Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *U.S. Trust*, 431 U.S. at 23. In most cases, the general and prospective applicability of a change in the law assures private parties with public contracts that the state will not impair its contractual obligations with them (or, what is the same thing, enhance the private parties' obligations). However, the Marina Amendment differs from an exercise of police power in two respects: (1) it singles out RUI for a change in its contract rather than applying generally to a broad range of employers; and (2) it retroactively alters the bargain that RUI and Berkeley struck.

First, generally applicable legislation typically protects the contracting party from special interest legislation or political gamesmanship. *See Exxon*, 462 U.S. at 191-92. Even generally applicable legislation, however, may run afoul of the Contract Clause if the parties specifically negotiated a different term. *See, e.g.*, *Air Cal, Inc. v. City & County of San Francisco*, 865 F.2d 1112, 1117 (9th Cir. 1989) (San Francisco's proprietary power "encompasses the power to regulate use of the property by ordinance, so long as the city has not chosen to enter contracts for use that are

inconsistent with such regulations") (citations omitted). In most instances, however, a party to a government contract affected by legislation must follow a law of general applicability just like everyone else.

Where the Marina Amendment is concerned, "just like everyone else" turns out to be RUI and, perhaps, no one else. When Berkeley contemplated the Marina Amendment, the City Attorney admitted that "[a]lthough it is obvious that some of the larger Marina entities, such as Skates, HS Lordships and the Radisson, will be covered by the amended Ordinance, the City does not know with any certainty which other entities will be included." However, of the three principal leaseholders in the Marina Zone, the Radisson, HS Lordships, and Skates (owned by RUI), only Skates is currently subject to the Marina Amendment. Both the Radisson and HS Lordships have collective bargaining agreements and are thus exempt from the LWO and the Marina Amendment. Berkeley, Cal., Ordinance 6548-N.S. (June 27, 2000), § 13.27.070H. Berkeley also sent notice of the proposed amendment to other parties, including water-based entities, such as yacht, waterski, and rowing clubs; and small retailers, including a caterer and a kite shop. But, it is unlikely the Marina Amendment covers any of the smaller entities, because they do not meet the threshold of six or more employees and $350,000 in annual gross receipts. *Id.* § 13.27.030. RUI has alleged that, at the very most, five businesses are currently subject to the Marina Amendment. "But whether or not the legislation was aimed largely at a single employer, it clearly has an extremely narrow focus." *Spannaus*, 438 U.S. at 248 (footnote omitted).

This narrow reach distinguishes the Marina Amendment from a minimum wage law. If Berkeley had raised the minimum wage through a law of general applicability, RUI would not have cause to complain based on contractual silence in the lease. But that is precisely the problem here. The Marina Amendment is not a law of general applicability.

RUI has a valid claim under the Contract Clause because Berkeley enacted a law that was obviously directed at RUI and, maybe, a couple of other Marina lessees. Berkeley may not alter RUI's lease at will just because the City Council, rather than the City's procurement staff, approved the changes. Berkeley abused its sovereign prerogatives to gain an advantage in a lease it entered into in its proprietary capacity.

Second, the Supreme Court has repeatedly expressed its suspicion of retroactive laws because they are "generally unjust," *Eastern Enterprises v. Apfel*, 524 U.S. 498, 533 (1998) (O'Connor, J., plurality) (citation omitted), and "deprive citizens of legitimate expectations and upset settled transactions." *Romein*, 503 U.S. at 191. *Accord Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). Although the Court frequently tests retroactive legislation against the Due Process Clause, it has noted that the Contract, Bill of Attainder, Ex Post Facto, and Takings Clauses specifically codify the "antiretroactivity principle." *Landgraf*, 511 U.S. at 266.

Narrowness or retroactivity alone does not offend the Contract Clause. A municipality may require a prescribed wage of all employers, including its lessees, through a law of general applicability, such as a minimum wage law.[10] Alternatively, a narrow but prospectively applied provision would allow lessees the opportunity to bargain for different terms. A comparison of the original LWO and the Marina

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10 At oral argument, Appellant's counsel agreed that if the living wage had been immediately and generally applicable throughout the city, RUI would have no claim. The majority mistakenly contends that this common-sense statement is a concession of RUI's position. Maj. op. at 1153-54.

Amendment makes plain these differences.[11] Unlike the Marina Amendment, the original LWO was both prospective and generally applicable. It applied to parties doing business with the City everywhere in Berkeley, rather than just those in a narrow geographic area, and it applied to contracts entered into after the date of its enactment, rather than to already bargained-for contracts. Consequently, if RUI were challenging the original Living Wage Ordinance rather than the Marina Amendment, it would have no objections based on the Contract Clause. However, because the Marina Amendment is neither generally nor prospectively applicable, I believe it is not a valid exercise of police power and that it contravenes the Contract Clause.

5

The majority further reasons that RUI and Berkeley agreed that RUI would abide by future law, including, presumably, the Marina Amendment. Maj. op. at 1153-54. Paragraph 25 of the lease specifies that the lessee shall "comply with all applicable . . . ordinances . . . of the City . . . ." RUI's contractual promise to comply with applicable city ordinances is not the equivalent of agreeing that the City may amend the lease at will, so long as it does so through an ordinance. The provision is simply a boilerplate promise to obey the law—a provision common in leases between private parties—the violation of which would be grounds for Berkeley to seek contractual remedies for breach.

We have previously held that such provisions are not open invitations to government parties to alter their contracts.

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[11] The majority unconvincingly attempts to elide these differences by characterizing them as the manner in which Berkeley exercises its authority. Maj. op. at 1154. However, the majority cites no authority to support this proposition.

In *S. Cal. Gas*, 336 F.3d 885, the gas company and the City of Santa Ana had entered into a contract in 1938 that provided the City could demand payment for the cost of repairs to public property caused by gas company operations. 336 F.3d at 887-88. The contract also provided that the gas company would comply with "all of the ordinances, rules and regulations heretofore or hereafter adopted by [the City] in the exercise of its police powers." *Id.* at 888. In 2001 the City adopted a "trench cut ordinance" requiring advance payment, without consideration for actual damages or the quality of the repairs. We rejected the City's argument that the parties had agreed future ordinances could alter the lease and found that Santa Ana had violated the Contract Clause. Calling the City's interpretation "absurd," we held that the contract could not be read "in such a way that reserves to Santa Ana the power to unilaterally alter the terms of the agreement." *Id.* at 893. *See also Cont'l Illinois Nat'l Bank*, 696 F.2d at 698.

RUI surely did not consent to have the City make whatever changes to the lease it wished. The fact that the City effectively amended the lease by legislation—a narrow and retroactive ordinance—cannot relieve Berkeley of the duty to comply with the Contract Clause.

B

Because it erroneously concluded that RUI's lease was not impaired, the majority did not reach the subsequent steps of the Contract Clause analysis. Once RUI demonstrated that Berkeley substantially impaired its contract, the state must show that a "significant and legitimate public purpose" justifies the law and that it does not merely "provid[e] a benefit to special interests with its police power." *Energy Reserves*, 459 U.S. at 411-12. I would conclude that the Marina Amendment does not serve such a purpose and that it is unreasonable and unnecessary.

1

The LWO, as originally enacted, serves a broad social purpose. The "living wage" is a relatively new and aggressive approach to problems that local jurisdictions have historically addressed through a combination of minimum wage laws and public assistance programs. Berkeley's City Council included a number of legislative findings as a preamble to the LWO. The City found, for example, that "far too many people working in Berkeley and their families live below or near the poverty line," that inadequate compensation "fails to provide service employees with resources sufficient to afford life," and that the "privilege of using public property to operate a business should not be granted to parties that will exacerbate the problems associated with inadequate compensation of workers." Berkeley, Cal., Ordinance 6548-N.S. (June 27, 2000), § 1 d, f, g. To the latter end, the LWO serves the purpose of instructing city negotiators and placing would-be contractors on notice that Berkeley will demand a living wage provision in all future contracts.

What is at issue here, however, is not the purpose of the LWO, but the legitimacy of the Marina Amendment. The Supreme Court has distinguished "generally applicable rule[s] of conduct," *Exxon Corp.*, 462 U.S. at 191-92, that remedy "broad, generalized economic or social problem[s]," *Spannaus*, 438 U.S. at 250, from enactments that have "a very narrow focus" and are "aimed at specific" parties. *Energy Reserves*, 459 U.S. at 412 n.13. "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Id.* at 412.

The Marina Amendment, "imposing a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees, was not enacted to deal with a situation remotely approaching the broad and desperate

emergency economic conditions" described by the City Council. *Spannaus*, 438 U.S. at 249. Several aspects of the Marina Amendment show that it does not serve a broad social purpose. Most obviously, as previously pointed out, the parties are uncertain as to how many employers are even subject to the Marina Amendment, but the number is probably fewer than five.[12]

Just as the living wage amendment narrowly assigns its burdens, it narrowly directs its benefits. The Marina Amendment covers only a modest number of workers, and many of these will not receive the living wage because a

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[12] The smallness of the burdened class results from the narrow geographic scope of the Marina Amendment. According to one living wage advocacy group, Berkeley's Marina Amendment was "the first area-based living wage policy in the nation." Living Wage Resource Center, *Living Wage Successes: A Compilation of Living Wage Policies on the Books*, available at http://www.livingwagecampaign.org/victories.php (last visited May 25, 2004). The only other location-based living wage policy is Jack London Square at the Port of Oakland. Unlike Berkeley's Marina Amendment, however, the Port of Oakland's location-based living wage ordinance applies only prospectively to contracts entered into *after* the provision's effective date. It reaches existing agreements only when they are "amended to benefit the business." Port of Oakland, *Living Wage Frequently Asked Questions*, available at http://www.portofoakland.com/ portnyou/livingwa.asp (last visited May 25, 2004).

The City of Santa Monica, California, passed a living wage provision that applied to the coastal tourist district. Voters repealed it by referendum in November 2002. Andrew Fixmer, *Hotly Debated Measure Defeated*, SANTA MONICA DAILY PRESS, Nov. 6, 2002, at 1.

collective bargaining agreement exempts their employers, such as the Radisson and HS Lordships, from the ordinance.[13] With so few beneficiaries the Marina Amendment falls well short of addressing a broad social problem and appears to address only the demands of Local 2850 members in the Marina Zone. Furthermore, any claim Berkeley could make for the need to remedy conditions among workers citywide is belied by the fact that Berkeley did not apply the LWO retroactively to other city contractors, nor did it apply the LWO to private employment contracts. The City has offered no explanation why employees at the Marina have any different needs or circumstances than other employees in Berkeley. In sum, "this law can hardly be characterized, like the law at issue in the *Blaisdell* case, as one enacted to protect a broad societal interest rather than a narrow class." *Spannaus*, 438 U.S. at 248-49.

Courts within our circuit have been skeptical of public contracts that furnish benefits to a small class by retroactively impairing the contracts of another small class. In *Ross v. City of Berkeley*, 655 F. Supp. 820 (N.D. Cal. 1987), the City of Berkeley enacted an ordinance that limited the grounds for eviction or lease non-renewal on commercial properties in a particular City district. *Id.* at 823-26. The acceptable grounds for eviction did not include owner occupancy. *Id.* Judge Patel found that the City's ordinance "isolate[d] one group of commercial lessors ... and nullifie[d] a central aspect of their contractual rights." *Id.* at

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13 Berkeley's expert estimates that approximately 350 employees work for the Marina lessees and that at least half of them earn less than the living wage. The record does not show how many of these 175 employees work for the Radisson or HS Lordships, both of which are exempted from the LWO because they have collective bargaining agreements.

833. She disapproved of the ordinance's narrow geographic definition, the severity of its impairment, and the limited significance of its social purpose. *See id.* at 835. "Unlike a broad rule of general conduct impacting incidentally on the leases in question, it applies exclusively and explicitly to the contractual obligations of the narrow group of lessors and lessees in the [particular] commercial district of the City, and confers a direct benefit on one class at the expense of the other." *Id.* She concluded that Berkeley's ordinance violated the Contract Clause. *Id.* at 835-36.

Similarly, the California Court of Appeals in *Interstate Marina Dev. Co. v. County of Los Angeles*, 202 Cal. Rptr. 377 (Cal. Ct. App. 1984), distinguished a rent control ordinance that applied county-wide from a second ordinance that limited the permissible causes for terminating residential slip tenancies at the marina. *Id.* at 382. Both laws purportedly addressed the shortage of affordable housing in the county, *id.* at 381, 385, but the court found that only the rent control law served this broad purpose. "Unlike the [slip tenancy] ordinance, which aimed at giving only residential boat slip tenants the security of an indefinite term of lease, the County rent law was directed at remedying a broad social and economic problem." *Id.* at 385. The court found that the marina ordinance "substantially impaired" the slip tenants' leases, and it "failed to meet an important general social problem in that the group protected was small and loss of [the slip tenants'] rights would not substantially affect the housing supply of the County." *Id.* at 442. The County did not appeal the lower court's conclusion that the marina ordinance violated the Contract Clause, *id.* at 442, and the appeals court affirmed the lower court's determination that the general rent control ordinance did not substantially impair the leases. *Id.* at 449.

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Even if the Marina Amendment satisfied a legitimate and significant government interest, it is neither reasonable nor necessary to Berkeley's stated goals. Ordinarily, we would defer to the City Council on the question of an ordinance's reasonableness and necessity, but "we are 'less deferential to a state's judgment of reasonableness and necessity when a state's legislation is self-serving and impairs the obligation of its own contracts.'" *Univ. of Hawaii Prof'l Assembly*, 183 F.3d at 1107 (quoting *Condell v. Bress*, 983 F.2d 415, 418 (2d Cir. 1993)). *Accord U.S. Trust*, 431 U.S. at 26.

Berkeley offers several unsatisfactory explanations for the reasonableness and necessity of the Marina Amendment. The City Council declared that the privilege of using public Marina lands should not be afforded to parties exacerbating the inadequacy of worker compensation and that a portion of the revenues generated from operating a business at the Marina's unique location should be used to compensate employees. Berkeley, Cal., Ordinance 6583-N.S. (Sept. 19, 2000), § 1, A, B. However, if Berkeley wanted these contractual terms, it could have negotiated such assurances when it leased the Marina in 1968 or upon the 1996 renegotiation. Berkeley declined to do so. Berkeley also argues that the City improved the Marina area after the lease began and that these improvements justify RUI paying its workers additional compensation. When Berkeley renegotiated lease conditions in 1996, it knew the Marina location possessed special qualities, the potential for generating revenues, and what additional enhancements Berkeley would likely make to the Marina in the future. "[A]n impairment is not a reasonable one if the problem sought to be resolved by an impairment of the contract existed at the time the contractual obligation was incurred." *Univ. of Hawaii Prof'l Assembly*, 183 F.3d at 1107 (quoting *Massachusetts Cmty Coll. v. Commonwealth*, 649 N.E.2d 708, 713 (Mass. 1995)). Having neglected to negotiate those

terms, Berkeley's insistence on additional lease conditions is unreasonable.

The City expressed concern that the public's knowledge that Marina workers are not paid a living wage will deter the public from patronizing Marina businesses. Berkeley, Cal., Ordinance 6583-N.S. (Sept. 19, 2000), § 1, C. The Marina's success controverts this speculative claim. Also, Berkeley's solicitude for the sensibilities of the Marina's patrons is undermined by its failure to address the patrons of the City's other contractors who must wait for Berkeley to negotiate those contracts in the future.

Finally, Berkeley argues that higher wages will improve the quality of service provided at Marina businesses. *Id.* § 1, D. This assertion is, at best, conjectural. There is no evidence that Marina service does not meet ordinary industry standards; in fact, the success of the Marina businesses would suggest that the service was satisfactory. The 1968 lease already obligates RUI to "maintain adequate personnel for the efficient service of customers."

Even if the Marina Amendment's goals were appropriate, "the contract clause of the Federal Constitution limits the ability of the State, or subdivision of a State, to abridge its contractual obligations without first pursuing other alternatives." *Univ. of Hawaii Prof'l Assembly*, 183 F.3d at 1107 (quotations omitted). An impairment is unnecessary if "an evident and more moderate course would serve its purpose equally well." *U.S. Trust*, 431 U.S. at 31. More moderate alternatives "include raising revenues through higher taxes or preserving funds through budget restrictions." *S. Cal. Gas*, 336 F.3d at 897. Such a showing is indeed a "heavy burden," *id.* at 896, because since the Supreme Court's decision in *U.S. Trust*, "no Ninth Circuit or Supreme Court case has found a statute or ordinance necessary when the law in question altered a financial term of an agreement to which a state entity was a party." *Id.* at 897 (citations

omitted). In order to prevail, Berkeley must show that it cannot alleviate the financial conditions of workers through other means, such as by offering tax incentives to complying employers or by subsidizing the wages of Marina employees. This it has not done.

C

The Marina Amendment also represents the very type of failure in the political process that the Contract Clause is designed to prevent. *Energy Reserves*, 459 U.S. at 412 (citing *Spannaus*, 438 U.S. at 247-48 & n.20). "The principal danger addressed by the contracts clause is that the government will favor one determinate set of persons over another . . . ." Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 289 (1988). The Supreme Court long ago cautioned that when a government burdens a numerically small class, it may distort the democratic process. Where a rule of conduct applies to more than a few people, the people are "equally concerned," and the matter is especially well-suited for legislative action. *Bi-Metallic Investment Co. v. Colorado State Board of Equalization*, 239 U.S. 441, 445 (1915). But where, as here, "[a] relatively small number of persons [are] concerned," *id.* at 446, a danger exists that the legislature acted less out of concern for the general good than for special interests or even its own interests. This risk is heightened when the legislation is given retroactive effect because a retroactive statute "may be passed with an exact knowledge of who will benefit from it." Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960) (quoted in *Landgraf*, 511 U.S. at 267 n.20). The Supreme Court counseled that we must examine Contract Clause challenges for "circumstantial evidence" that "a small number . . . were singled out from [a] larger group" and

search for "any indication that the . . . political process ha[s] broken down." *Energy Reserves*, 459 U.S. at 417.

The Marina Amendment bears all of the hallmarks of special interest legislation. The original LWO applies to future city contracts and to existing contracts as they come up for renewal. The original LWO therefore covers RUI's lease when it comes due for renewal. Within a month of the passage of the LWO, Local 2850 urged the Mayor and City Council to make the LWO retroactive to the Marina's employers. It sent faxes to the Council members and mentioned specific employers. Appellee Local 2850 frankly confessed in its brief that Berkeley "used geographic location . . . as a proxy for ability to pay," and it acknowledged that other Berkeley employers could not afford to pay the living wage. These facts strongly suggest that Berkeley aimed the Marina Amendment at particular employers and meant to benefit particular parties.

Even more importantly, the Marina Amendment advances the City's own financial self-interest. The City may benefit in two ways. First, to the extent that the Marina Amendment raises workers' wages to a living wage, it reduces their dependence on public assistance programs. The Marina Amendment thus shifts the burden of public assistance programs from the City to RUI and its customers. Berkeley is relieved of the responsibility for the worker's public assistance and those funds are freed for other public purposes. The Marina Amendment operates similarly to an unfunded mandate because it accomplishes the City's goals through off-budget means.[14] *Cf. Printz v. United States*,

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[14] The LWO accomplishes a similar purpose, of course, but its mandate is prospective and conditioned on private parties entering into contracts with the City.

521 U.S. 898, 930 (1997) ("By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes"); *id.* at 957-58 (Stevens, J., dissenting) (suggesting that such actions represent a failure of "political safeguards").

Second, depending on RUI's elasticity of demand, RUI's gross receipts may go up under the Marina Amendment. If RUI raises its prices and its gross receipts increase, the amount of rent that RUI pays will increase as well because the lease defines the amount of rent as a fixed percentage of its gross receipts. In sum, the Marina Amendment may actually generate revenues for the City's coffers—at little or no political cost to Berkeley's elected officials.

Regrettably, the majority's failure to recognize this Contract Clause violation has significant implications for employees far from Berkeley's Marina. Under the majority's holding, contractual silence authorizes a municipality to impose additional terms on particular contracting parties—so long as the municipality cloaks the additional requirements in the form of a legislative enactment. Even more than the obvious unfairness of such unfettered license, it erodes democratic accountability by allowing governments to foist the costs of special interest legislation onto politically weak groups. *See Bi-Metallic*, 239 U.S. at 445-46. As described earlier, the Contract Clause has most often protected public employees from the opportunism of financially-strapped state and local governments. *See supra* at nn.8-9. The majority's opinion provides financially troubled governments with the license to extract more stringent terms from public employees whose collective bargaining agreements necessarily lack express terms on every aspect of the employment relationship. Such a result can hardly be categorized as aiding "the plight of its own working poor." Maj. op. at 1141.

III.

Berkeley's Marina Amendment substantially impairs RUI's lease, unnecessarily and unreasonably, without advancing a broad social purpose. I would hold that it violates the Contract Clause. I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUI ONE CORP., Plaintiff, v. CITY OF BERKELEY; and HOTEL EMPLOYEES & RESTAURANT EMPLOYEES, LOCAL 2850, Defendant.	No. C 00-3878 SI **ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

On March 1, 2002, the Court heard argument on plaintiff's motion seeking summary determination that the City of Berkeley's amended Living Wage Ordinance, as applied to plaintiff's restaurant, Skates on the Bay, is unconstitutional. Having considered the arguments of the parties and the papers submitted, including the papers filed by amici curiae, the Court hereby DENIES plaintiff's motion for the reasons set forth below.

BACKGROUND

On October 19, 2000, plaintiff RUI One Corporation, d.b.a. Skates on the Bay ("RUI"), filed this constitutional challenge to an amendment to the Living Wage Ordinance ("LWO") enacted by the City of Berkeley ("Berkeley"). Compl. at ¶¶ 1-4. Berkeley's LWO, adopted on June 27,

2000, requires that future city contractors and lessees pay their employees a wage of not less than $9.75 per hour if the employer pays a stated amount toward an employee medical care plan, or $11.37 per hour if the employer does not offer a medical plan. Compl. at ¶¶ 6-8. The LWO also requires that employees be provided at least 22 days of leave per year, including 12 days with pay, for sick leave, vacation, or personal necessity. Compl. at ¶ 9.

Plaintiff RUI does not challenge the LWO itself, but rather an amendment of October 19, 2000, making the LWO immediately effective against businesses in the area of the Berkeley Marina holding existing contracts or leases with the City, if the business employs six or more people and has annual gross sales of at least $350,000 ("Amendment"). Compl. at ¶ 11. Plaintiff is a lessee of the City, having been assigned, in 1996, a fifty year lease which originated in 1967. Compl. at ¶¶ 14, 15. The lease requires plaintiff to pay a base rent and a percentage rent, based on the gross receipts of plaintiff's restaurant, Skates on the Bay. Compl. at ¶ 15. Plaintiff asserts that the Amendment to the LWO amounts to a unilateral rent increase in violation of the Contracts Clause of the U.S. Constitution, the Equal Protection clauses of the U.S. and California Constitutions, and the Due Process prohibition against delegation of the police power. Compl. at ¶¶ 17-51.[1]

On January 29, 2001, this Court granted a motion by the Hotel Employees & Restaurant Employees Union, Local 2850 ("HERE") to intervene as a defendant in this suit. On November 16, 2001, plaintiff moved for summary judgment.

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[1] Plaintiff's Complaint alleges additional causes of action, but plaintiff's counsel stated at oral argument that plaintiff has agreed to dismiss with prejudice those claims not argued in its motion for summary judgment.

Briefs in opposition were subsequently filed by defendant Berkeley, defendant-intervenor HERE, and several amici curiae.[2] Plaintiff's motion is presently before this Court.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party [which] fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *see also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (the nonmoving party may not rely on the pleadings but must present significant probative evidence supporting the claim); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

DISCUSSION

A. Plaintiff's Contract Clause Claim

The Court turns first to plaintiff's claim that the LWO Amendment violates the Contract Clause of the U.S.

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[2] The amici curiae are: The Brennan Center for Justice at New York University School of Law; the Legal Aid Society -- Employment Law Center; the Center on Race, Poverty & the Environment; the Asian Pacific Environmental Network; and the Disability Rights Education & Defense Fund (collectively "amici").

Constitution.[3] As stated above, plaintiff does not challenge the LWO itself, which it acknowledges as a valid exercise of the government's contract powers. Pl.'s Mot. at 1:1-19. Plaintiff challenges only the Amendment which, plaintiff claims, singles out a small group of businesses for an illegitimate exercise of Berkeley's police powers, by requiring immediate compliance with the compensation requirements of the LWO. *Id.* at 1:16-2:3.

In *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983), the Supreme Court set out a three part test to determine whether a piece of legislation violates the Contract Clause. A court must determine: 1) whether the state law operates as a substantial impairment of a contractual relationship; 2) if a substantial impairment is found, whether the legislation is justified by a "significant and legitimate public purpose"; and 3) "whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Id.* at 411-412. The level of scrutiny to which the legislation is subjected increases with the severity of the impairment. *Id.* at 411. For the following reasons, the Court denies plaintiff's motion for summary judgment on the issue of substantial impairment. As such, the Court does not address the remaining two parts of the Contract Clause analysis.

Plaintiff asserts that the Amendment constitutes a rent increase imposed unilaterally by the City of Berkeley, thus impairing the lease agreement to which plaintiff and

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[3] The Contract Clause states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10, cl. 1.

Berkeley are parties, and that it also impairs plaintiff's employment arrangements with its employees. Pl.'s Mot. at 9:14-11:26. Plaintiff argues that, at the time it entered into a lease with Berkeley in 1996, it had no reason to expect that Berkeley would later impose on RUI a new requirement adding significantly to RUI's costs. Pl.'s Mot. at 9:20-10:4. Plaintiff argues that the Amendment is the first instance in which a city has relied on its police power to impose an LWO on businesses immediately, as opposed to prospectively. Pl.'s Mot. at 10:1-3, Wasserman Decl. at ¶ 10. In arguing that an overall impact on its business constitutes an impairment of its lease, RUI relies on *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), and *Ross v. City of Berkeley*, 655 F.Supp. 820 (N.D.Cal. 1987).

Defendants argue that there is no cognizable impairment of the lease, because no provision of the lease is regulated by the ordinance. Def. Berkeley's Oppo. at 10:15-11:13. Defendants rely on *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), for the proposition that to show impairment, plaintiff must indicate a particular clause of its lease with the city which the Amendment impairs. Def. Berkeley's Oppo. at 9:23-10:12. Defendants also argue that the provision of the lease requiring compliance with "all applicable laws, ordinances and regulations of the City, County, State and United States Governments," requires RUI to comply with the Amendment. Def. Berkeley's Oppo. at 11:14-12:25. In the alternative, defendants argue that any impairment to the lease is not substantial. Def. Berkeley's Oppo. at 14:13-16:20.

The inquiry into whether a "substantial impairment" has occurred has three components: whether there is a contractual relationship, whether a change in law impairs that relationship, and whether the impairment is substantial. *Romein*, 503 U.S. at 186. Plaintiff asserts that the Amendment constitutes an impairment of a) its lease with the

city, and b) its arrangements with its employees. The Court addresses each of these in turn.

1. Impairment of the Lease

Turning first to the question whether the Amendment effects a cognizable impairment of the lease, the Court finds that it does not. For an impairment to occur, the contract at issue must contain some indication that the parties intended for the disputed term to constitute part of the contract. *See Romein*, 503 U.S. at 186-87. In *Romein*, the Supreme Court rejected General Motors' challenge to a state statute requiring reimbursement of disabled employees whose benefits were withheld under a prior law. *Id.* at 185-86. General Motors argued that the new statute impaired its existing employment contracts, entered into after collective bargaining. *Id.* at 187. As there was no express term in the contracts concerning workers' compensation benefits, General Motors argued that the prior law was an implied term, because "the parties had bargained for other compensation with workers' compensation benefits in mind." *Id.* at 187. The Supreme Court rejected the challenge, finding that "there was no contractual agreement regarding the specific workers' compensation terms allegedly at issue." *Id.* at 186-87. The Court explained that impairment could be found only when legislation alters an express contract term, or when the laws "affect the validity, construction, and enforcement" of a contract. *Id.* at 189-90.

Plaintiff's attempt to distinguish *Romein* is unconvincing. *See* Pl.'s Reply at 7:21-8:27. Plaintiff rests its argument to a great extent on its representation that, had it negotiated its city lease with the understanding that it would be obliged to pay a higher wage to its employees, it would have negotiated a lower rent. *See, e.g.*, Pl.'s Reply at 7:22-8:12. This argument, however, was addressed and rejected by the Supreme Court in *Romein*. General Motors argued that it negotiated its employment contract with the prior law "in

mind," and the Court found this argument insufficient to give rise to impairment. *Romein*, 503 U.S. at 187. Plaintiff argues, further, that "the parties' expectations are clearly set forth in the lease," and points to three "explicit lease terms" it asserts are impaired. Pl.'s Reply at 6:8-7:20. These provisions are the requirement that RUI pay rent to the City, that it charge patrons reasonable prices, and that it maximize its sales volume. Pl.'s Reply at 6:12-7:7. The Court fords nothing in these terms indicating that an agreement was reached concerning the wages and other conditions applied to RUI's employees, nor any indication that the Amendment in any way affects the validity, construction, or enforcement of the lease. It goes without saying that the final terms of a negotiated contract are independent. It is also undeniably true that the Amendment, like so much other regulation, increases costs borne by the parties against whom it is enforced. As a result of the workers' compensation statute at issue in *Romein*, for example, General Motors was required to refund nearly $25 million to disabled employees. *Romein*, 503 U.S. at 186. Absent a showing that the contract in question was directly impacted, however, these facts cannot support a claim of impairment.

This conclusion is consistent with the *Allied Steel* and *Ross* cases relied on by plaintiff. In *Allied*, the Minnesota state law at issue required a company leaving the state to pay pension benefits to all employees who had worked at least ten years. *Allied Steel*, 438 U.S. at 238-39. This statute directly conflicted with the express provision of the company's pension plan, under which pension benefits vested only under specific circumstances determined by reference to the employee's age and number of years of employment. The pension plan stated that "[n]o employee shall have any right to, or interest in, any part of the Trust's assets upon termination of his employment or otherwise, except as provided from time to time under this Plan," and reserved the company's right to amend the plan at any time.

Id. at 237-38. Finding that the statute "nullifie[d] express terms of the company's contractual obligations," the Supreme Court concluded that a substantial impairment had been shown. *Id.* at 247.

In *Ross v. City of Berkeley*, Chief Judge Patel invalidated a portion of Berkeley's commercial rent control ordinance. The court found that the ordinance significantly impaired existing leases of plaintiff owners/lessors, because an express provision of the leases, characterized by the court as "among the most essential," was defeated by the ordinance. *Ross*, 655 F.Supp. at 828. Plaintiffs' leases "unambiguously stipulate[d] a five-year term. At the expiration of the lease, the lessee is obliged by the explicit terms of the contract to surrender possession absent agreement of the lessor to a holdover month-to-month tenancy." *Id.* The ordinance required lease renewal except in a specified set of circumstances, thus "supplanting the lease's fixed five-year term with a potentially endless tenancy." *Id.*

In comparison with the contract terms at issue in *Allied Steel* and *Ross*, the provisions pointed to by plaintiff in the instant case cannot reasonably be construed as having been expressly nullified by the terms of the Amendment. The Court therefore finds no impairment of plaintiff's lease with the City.

2. Impairment of RUI's Employment Arrangement

Plaintiff's argument as to the existence of an impairment is more plausible, albeit less developed, with respect to its arrangement with its employees. Plaintiff alleges that the Amendment interferes with the agreement arrived at between itself and its employees specifying the wages and benefits its employees are to receive. Compl. at ¶ 20. RUI's employment "contract" consists of employee handbooks entitled "Crewmember Resource Guide" ("Guide") and "Policy Guide for Human Resources & Operations," along with an "Acknowledgment and Receipt Sign Off Form"

("Acknowledgment") on which employees must acknowledge that they have read and understood the handbooks. *See* Def. Berkeley Exs. 115, 125. The Acknowledgment states, *inter alia*, that the employee who signs it agrees to comply with the provisions of the Guide, and that "the Guide does not constitute a contract of employment and that [RUI] may change, revoke, interpret or add to any of the policies or guidelines described in the Guide at any time and in its sole discretion with or without prior notice." *Id.* at Ex. 115. RUI cites cases to the effect that an at will agreement is a contract for employment, and that wages are a core component of such agreements. Pl.'s Reply at 16:6-21. Defendants argue that this disclaimer, and the at-will nature of the agreement, compel the conclusion that plaintiff has no contract with its employees. Def. Berkeley's Oppo. at 13:13-14:12.

Plaintiff argues that an at-will employment relationship is still an employment contract, but the only case it cites to this effect arose in a different context and stands for a different proposition. Pl.'s Reply at 16:6-18; citing *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 677 (1988). In that case, where an employee had been terminated for informing his employer that his supervisor was under FBI investigation for embezzlement, the court found that, in the absence of any express contract between the parties, the employer's course of conduct could create an implied-in-fact contract term requiring good cause for termination. *Foley*, 47 Cal.3d at 677 (1988). Upon examination of the specific course of conduct that had occurred between the employee and his employer, the court concluded that such an implied-in-fact contract term had been adequately alleged. *Id.* *Foley* sheds no light on the instant case. For the fact-specific doctrine of *Foley* to apply, plaintiff would have to submit evidence of an implied-in-fact contract including permanent wage and leave terms as to each of its employees. The question here is further complicated by the possibility that plaintiff is

estopped from arguing the existence of a contract by its express disclaimer in its Acknowledgment.

It is true that a unilateral contract may be formed even in at-will employment contexts. *See* Corbin on Contracts: Revised Ed., § 6.2 (1995). When an employer has made a promise of compensation for service and the employee renders the service, a unilateral contract arises in which the employer is bound to pay for the service so far as it has been rendered. *Id.* at 213. Such a contract, however, may end when the employer notifies the employee of his or her termination. *Id.* This notice operates as a revocation of the employee's power of acceptance through continued service, thus it is not treated as a breach of contract. *Id.* This doctrine indicates that the unilateral contract is continually recreated by the employer's offer of additional compensation for additional work, and by the employee's acceptance of the offer through performance. At each recreation, the terms and conditions of the agreement—including wages and benefits—are established anew. As such, there is no existing contract between RUI and its employees whose terms would impaired by the Amendment. The Court finds, therefore, that no significant impairment of any at-will arrangement between RUI and its employees has occurred.

3. Absence of a "Substantial" Impairment

Although denial of plaintiff's motion for summary judgment is warranted on the grounds discussed above, the Court finds that, even if the Amendment worked some impairment on either RUI's lease or its employment agreements, the effect of the Amendment is not "substantial." An important factor in determining whether a substantial impairment of contract is present is whether the relevant industry has been regulated in the past, thus giving a contracting party a "reasonable expectation" that it is subject

to further legislation.[4] *Energy Reserves Group*, 459 U.S. at 411. This inquiry does not concern whether the specific legislation at issue is new, but rather, whether the field to which the law applies has in the past been subject to regulation. It is therefore immaterial to a Contracts Clause inquiry that Berkeley invoked its police powers, rather than its contract powers, when it enacted the Amendment, or that the Amendment applies to a particular geographic area. Pl.'s Mot. at 1:1-25. The relevant question is whether past regulation was sufficient to give notice to a contracting party that provisions of its agreement were subject to future legislation of one form or another. *See, e.g., Energy Reserves Group*, 459 U.S. at 411 ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.")

Defendants have demonstrated that the type of regulation at issue here—labor legislation affecting wages and other conditions of employment—is far from novel. Amici recount the regulation of wages and other conditions of labor throughout the twentieth century, starting with wage and hour laws enacted by cities and states, and reaching the federal level with the passage of the Fair Labor Standards

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[4] Although the parties dispute at length the annual cost imposed upon RUI by the Amendment, the Court discerns no suggestion in the relevant cases that the dollar amount of the burden is relevant to a determination of the "significance" of the alleged impairment. Because the inquiry appears to center on the qualitative considerations such as the centrality of the affected contract terms and whether the type of legislation at issue could reasonably have been anticipated, the Court does not analyze the parties' competing accounts of the Amendment's monetary impact.

Act in 1938. Amici Oppo. at 5:9-8:9. The FLSA preserves the power of local governments to regulate wages, stating that its provisions do not "excuse compliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter." Amici Oppo. at 7:1-12; *citing* 29 U.S.C. § 218(a). The particular phenomenon of the "living wage ordinance," in which cities and states enact a minimum wage higher than that established by the federal government, has spread over the past twenty years. Amici Oppo. at 9:10-18. Those laws take many forms, including those focusing on businesses receiving significant taxpayer-funded benefits; the District of Columbia imposes wage requirements on all private employers in the city. Amici Oppo. at 10:3-12:2. The Court concludes, therefore, that even if RUI had shown impairment to have occurred, the absence of a significant impairment outside the realm of its reasonable expectation is itself sufficient to defeat plaintiff's claim.

At oral argument, plaintiff's counsel emphasized what he claimed is the unprecedented nature of the leave provision of the Berkeley LWO. However, the question is not whether the specific legislation at issue is new, but rather whether the subject matter, or "industry" at issue, is one which has been sufficiently regulated in the past that a contracting party might reasonably expect further legislation in the future. *See, e.g., Energy Reserves Group*, 459 U.S. at 411; *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 413-416 (1983). Certainly the general area of employee leave has previously been regulated; legislation concerning family medical leave, leave for jury duty, and other regulation of employee leave is contained in the

California Labor Code and in federal law. The Court is satisfied that employee leave is a heavily regulated area.[5]

For the foregoing reasons, plaintiff's motion for summary judgment as to its claim under the Contracts Clause is DENIED.[6]

B. Plaintiff's Equal Protection Claims

Plaintiff argues that the Amendment violates the equal protection clauses of the U.S. and California Constitutions. Pl.'s Mot. at 17:15-21:26, citing U.S. Const. Amend. XIV, Cal. Const. Art I, § 7(a). The test for validity of a statute under each of these provisions is "substantially the same," and the parties treat them collectively in their briefs. *See Los Angeles County v. Southern Calif. Tel. Co.*, 32 Cal.2d 378, 389 (1948). Where a suspect classification is not involved, the law must bear a rational relationship to a legitimate state

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5 Plaintiffs brief contains a footnote which states, "The mandatory vacation requirement also results in an unconstitutional taking of RUI's property, in violation of the Fifth Amendment." Pl.'s Reply at 5, n.5. The takings issue, however, has never been briefed, was not argued at the hearing, and has not been submitted to this Court.

6 Because the Court finds in favor of defendants as to the threshold issue of substantial impairment, the Court does not here address the questions of public purpose or appropriateness of character. Because the question of standard of review relates to the government's asserted purpose, rather than the fact of impairment, the Court also declines to address that issue. *Energy Reserves Group*, 459 U.S. at 413 & n.14. The question of the Amendment's purpose, however, does arise in the following section concerning plaintiff's Equal Protection claims.

interest to survive an equal protection challenge. *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976).

According to the "Findings" section of the LWO itself, the purposes of the ordinance are:

> e. to promote sustenance and creation of living wage jobs [to] increase consumer income, decrease levels of poverty, invigorate neighborhood business and reduce the need for taxpayer-funded social programs in other areas; and
>
> f. [to employ City funds used to contract for services to] promote an employment environment that enhances the general quality of life within the community and maximizes the productive effects of the City's limited resources; and
>
> g. [to avoid the effective payment of] subsidies to business, which do not provide health insurance to their employees[,] ensuring that persons delivering City services are healthy, as lack of health care can affect performance and absenteeism.

Wasserman Decl. at Ex. A.

The "Findings" section of the Amendment recites the following:

> A. The privilege of using the Public Trust tidelands to operate a revenue-generating enterprise should not be extended to parties that will exacerbate the problems associated with inadequate compensation of workers . . . . The City also expends considerable sums on the maintenance of the Public Trust tidelands as an attractive and pleasant location for both the public and entities operating therein. Therefore, the public interest is best served by requiring that

> those parties who operate on Public trust land pay their employees a living wage; and
>
> B. Employers who operate on Public Trust land enjoy a unique location and amenities which afford significant financial benefits, a reasonable amount of which should be used to provide employees with a living wage and health care benefits; and
>
> C. Members of the public who visit the Public Trust tidelands have a limited choice of businesses to patronize in that area. The public interest is best served by ensuring that the public is not deterred from visiting the Public Trust tidelands because they do not wish to patronize businesses who do not pay their employees a living wage or provide them with health care benefits. A living wage and the provision of health care benefits will also improve the service given to the public by employees of entities on Public Trust tidelands by improving the quality of life of the employees.

Wasserman Decl. at Ex. B.

Plaintiff argues that these stated purposes are illegitimate because the City's findings do not support a need for an immediate increase in wages in the Marina Zone. Pl.'s Mot. at 19:1-9. Therefore, asserts plaintiff, the distinction drawn between city contractors and lessees inside, as opposed to outside, the Marina Zone, and the broader distinction made between all business inside and outside the Marina Zone, are arbitrary and unfair. Pl.'s Mot. at 19:10-20:21. The Court disagrees. Berkeley applied the Amendment to businesses in the Marina Zone based on the City Council's belief that the Marina businesses enjoyed unique benefits including their prime location, created and maintained by millions of dollars in public outlays, the City's active promotion of activities in

the Marina area, and the enforced absence of competitors in the area. Wasserman Decl. at Ex. B; Def. Berkeley's Oppo. at 3:16-7:2.

Under rational basis review, these considerations are more than sufficient to justify immediate imposition of the LWO's requirements on Marina business. The absence of a study or other concrete findings by the legislature does not render the Amendment unconstitutional; rather, it passes muster if, as here, there is "any reasonably conceivable set of facts" that could provide a rational basis for the classification at issue. *F.C.C. v. Beach Communication, Inc.*, 508 U.S. 307, 313-14 (1993). In addition, equal protection doctrine has long permitted legislative bodies to pursue reform in an incremental fashion, singling out those aspects of the problem believed to be most acute. *See Dukes*, 427 U.S. at 303. Plaintiff argues that the Amendment's stated justifications are illegitimate because they are merely a pretext for Berkeley's desire to support union efforts in the Marina area. Pl.'s Mot. at 20:22-21:26. This argument, too, is without merit. Where a court finds a "plausible reason" for legislative action, its inquiry ends. *United States Railroad Retirement Rd. v. Fritz*, 508 U.S. 307, 312 (1993).

C. Plaintiff's Due Process Claim

The LWO contains an exemption rendering its terms inapplicable to certain groups of employees, including "[a]n employee subject to a bona fide collective bargaining agreement where the waiver of the provisions of this Ordinance are set forth in clear and unambiguous terms in such an agreement." Wasserman Decl. at Ex. A. Plaintiff claims that this exclusion unconstitutionally delegates to union members the power to set a wage lower than the amount in the LWO, and charges that this delegation is unlimited by standards or oversight. Pl.'s Mot. at 22:1-25:18.

Although this question is much closer than the previous two, the Court finds a grant of summary judgment inappropriate. Plaintiff relies almost entirely on a single case, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). *Carter* invalidated a provision of the Bituminous Coal Conservation Act of 1935, permitting some producers and some miners to fix wages and hours for the industry.[7] The Supreme Court concluded that the effect of this provision was "to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority." *Id.* at 311. *Carter* was never overturned, but the circumstance of "a group of producers [making] the law and [forcing] it on a minority" was later distinguished from the permissible case in which a legislature "merely place[s] a restriction upon its own regulation by withholding its operation as to a given market 'unless two-thirds of the [affected group] favor it.'" *See Currin v. Wallace*, 306 U.S. 1, 15-16 (1939). In *Currin*,

---

[7] The provision read: "Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the preceding calendar year and the representatives of more than one-half the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts." *Id.* at 283-84.

the Supreme Court upheld a law authorizing the Secretary of Agriculture to designate tobacco markets to be regulated only if two-thirds of the growers favored regulation. *Id.* The relevant inquiry, therefore, is whether the LWO broadly delegates the authority to legislate, or whether it merely withholds its operation in a narrow case.

The Court finds that the LWO's opt-out provision falls into the latter category. The instant case undeniably resembles *Carter* in that it concerns labor regulation and an exemption tied to a union's negotiation of a collective bargaining agreement. This case departs crucially from *Carter*, however, in that it is merely an exemption, granting a group of potentially affected workers the option of waiving the protections of ordinance. In contrast to the circumstances of *Carter*, the Berkeley City Council, through the LWO, has set the minimum hourly wage that may be paid under the LWO. Instead of conferring this power to a union, the LWO merely withholds its own operation under certain conditions. As the Supreme Court later stated in upholding a state law delaying franchise establishments and relocations only when protested by existing franchisees, "[a]n otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protections." *New Motor Vehicle Board v. Fox*, 439 U.S. 96, 109 (1978). Plaintiff's motion for summary judgment as to its Due Process claim is DENIED.

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is DENIED.

IT IS SO ORDERED.

Dated: March 13, 2002

/s/
SUSAN ILLSTON
United States District Judge

United States District Court
for the
Northern District of California
March 13, 2002.

* * CERTIFICATE OF SERVICE * *

Case Number:3:00-cv-03878

RUI One Corporation

vs

City of Berkeley

I, the undersigned, hereby certify that I am an employee in the office of the Clerk, U.S. District Court, Northern District of California.

That on March 13, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUI ONE CORPORATION, a Washington corporation, Plaintiff-Appellant, v. CITY OF BERKELEY;, Defendant-Appellee, HOTEL EMPLOYEES & RESTAURANT EMPLOYEES UNION LOCAL 2850, Defendant-intervenor-Appellee.	No. 02-15762 D.C. No. CV-00-03878-SI Northern District of California, San Francisco ORDER

Before: GRABER, WARDLAW, and BYBEE, Circuit Judges.

A majority of the panel has voted to deny the petition for panel rehearing and petition for rehearing en banc. Judge Bybee votes to grant the petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are DENIED.

APPENDIX D

RUI ONE CORPORATION, a Washington corporation, Plaintiff-Appellant, v. CITY OF BERKELEY;, Defendant-Appellee, HOTEL EMPLOYEES & RESTAURANT EMPLOYEES UNION LOCAL 2850, Defendant-intervenor-Appellee.	No. 02-15762 D.C. No. CV-00-03878-SI Northern District of California, San Francisco ORDER

Before: WARDLAW, Circuit Judge.

RUI One Corporation's motion for stay of the issuance of the mandate pending application for writ of certiorari is granted. Fed. R. App. P. 41(b).

Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court.

It is so ORDERED.

(4)

No. 04-582

Supreme Court, U.S.
FILED
DEC 1 - 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RUI ONE CORPORATION,

Petitioner,

v.

CITY OF BERKELEY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeal For The Ninth Circuit

BRIEF IN OPPOSITION

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I. INTRODUCTION

Pursuant to Rule 15, Respondent City of Berkeley (hereafter "City") hereby files this brief in opposition to the petition for writ of certiorari (hereafter "Pet.") by RUI One (hereafter "RUI"). The City primarily points out RUI's misstatements concerning the record in this case, RUI's mischaracterization of the Court of Appeal's opinion and its incorrect analysis of the applicable law. The City also explains that the Petition simply does not meet the threshold requirements for invoking Supreme Court jurisdiction on certiorari.

II. RUI MISREPRESENTS THE RECORD, MISCHARACTERIZES THE COURT OF APPEAL'S OPINION AND MISSTATES THE QUESTION PRESENTED

A. The Undisputed Court Record Indicates That The Marina Amendment Under Challenge Was Assumed To Apply To Up To Ten Businesses.

RUI has erroneously claimed that the City's Marina Amendment under challenge in this action applies only to a single business. On this false premise RUI has framed the first question to be decided as a needed clarification by this Court of the parameters of a "class of one" claim under the Equal Protection Clause. RUI Pet. p. i. RUI's representations, are belied by undisputed evidence in the record, submitted by RUI itself in support of RUI's motion for summary judgment. Exhibit Q to the declaration of RUI counsel Zach Wasserman is a copy of a notice sent out by the City of Berkeley during the pendency of the legislative process leading to adoption of the challenged amendment.

The City sent notice to ten businesses it believed were likely affected by its Marina Amendment. CR 56.

Moreover, the Ninth Circuit rejected RUI's class of one argument on the *facts* in this case and not on the law. "Even though '[c]lassifications should be scrutinized more carefully the smaller and more vulnerable the class is,' *id.* (quoting *Esmail v. Macrane*, 52 F.3d 176, 180 (7th Cir. 1995) *a number of large businesses* that occupy prime real estate can hardly be considered vulnerable. It was certainly rational for the City to treat larger Marina businesses differently from their competitors outside the Marina." (Emphasis supplied.) Pet. App. 32a.[1]

[1] While Judge Bybee the dissenting member of the Ninth Circuit panel states that RUI may be the only government contractor who is subject to the ordinance, his reasons for doing so are either questionable or based on factual speculation. First, Judge Bybee excludes from consideration two businesses that were clearly subject to the ordinance but who obtained negotiated waivers of the provisions of the ordinance in collective bargaining agreements which had superior benefit packages. The waiver provision is a requirement of the ordinance itself. Thus, it is inaccurate to state that these two businesses were not subject to the ordinance. It would be more accurate to state that these two businesses were in compliance with the ordinance to which they were subject. RUI is free to comply in the same manner. The fact that only one member of a regulated class decides to violate the law does not turn the issue into a class of one claim. Such a claim requires that a single individual is treated uniquely compared to others similarly situated. Judge Bybee acknowledges that the City sent notice to ten businesses. He dismisses this fact by speculating, without any support in the record, that some of these businesses would not have had the gross receipts necessary to trigger the Marina Amendment's mandates. The burden to prove this claim by undisputed material facts is on RUI, who filed this motion for summary judgment. It has not met its burden. Indeed the undisputed facts in the record, submitted by RUI itself, are to the contrary.

To the extent that RUI has reduced this larger regulated class to a class of one it seems to be doing so because only RUI chose to ignore the mandates of the challenged law. Quite obviously, a class of one claim is not created simply because only one member of a larger regulated class decides to be a scofflaw. The leading United States Supreme Court case, on which RUI relies, points out that the successful equal protection claimants had shown that they were singled out for treatment not meted to "*others similarly situated.*" (Emphasis supplied.) See *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000). Here, the record reflects the fact that two regulated Marina businesses had availed themselves of provisions of the Living Wage ordinance which allowed for a business to opt out of its provisions when its provisions were expressly waived in a collective bargaining agreement. The purpose of this provision is to allow workers to negotiate for a better overall benefit package than the limited wages and benefits provided for by the Living Wage ordinance. The fact that all other regulated businesses have apparently complied with the Living Wage ordinance does not make RUI a regulated "class of one"; it makes RUI the only apparent law breaker, a status meriting no special protection under the Equal Protection Clause.

B. The Court Of Appeal Rejected A Class Of One Claim Because On The Facts "A Number Of Large Businesses" In The Marina Were Regulated And The Challenged City Economic Legislation Had A Rational Basis.

RUI's misrepresentation about the Ninth Circuit's opinion, is almost shockingly misleading when it states

that the Court of Appeal held that "municipalities have 'virtually unreviewable' discretion to legislate incrementally *against one business at a time* to achieve a broad social and economic objective, and that evidence of a "class of one" claim is entirely irrelevant for purposes of the Equal Protection Clause." (Emphasis supplied.) See Pet. p. i. In fact, the Court of Appeal actually pointed out that a number of large businesses were affected by the challenged law after discussing caselaw concerning a "class of one" equal protection claim. Pet. App. 32a. At no point did the Ninth Circuit conclude that the City had only regulated a *single business*.

RUI's constant disdainful reference to the Ninth Circuit term "virtually unreviewable discretion" is curious, since the term is taken from this Court's own opinion in *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993). Thus, it is unclear what error could conceivably have been committed by the Ninth Circuit when it so closely followed this Court's own precedent and reasoning in an Equal Protection case. In any event, this term was not used by the Ninth Court to grant the City the authority to regulate a single business but to illustrate a different point. The Ninth Circuit described the equal protection issue before it as "challenges to the ordinance's terms on Marina businesses prior to lease negotiations but not upon other similar businesses elsewhere in the City." (Emphasis supplied.) Pet. 30a. It then correctly observed that "[s]*uch* legislative judgments are virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." (Emphasis supplied.) *Id.* quoting *Beach Communications*, 508 U.S. at 316. In short, to the extent RUI constantly bemoans the term "virtually unreviewable discretion", it is challenging a holding of this

Court rendered over ten years ago, rather than any erratic Ninth Circuit variant on it, as RUI continually implies.

RUI also misrepresents the Court of Appeal's opinion and the record in the portion of its petition entitled "Petition for Certiorari." There it states that under the Ninth Circuit's decision "municipalities nationwide would have 'virtually unreviewable discretion' to rewrite its contracts retroactively with individual businesses by legislating against one businesses at a time – based upon a highly attenuated relationship to a broad, and generalized obligation – irrespective of evidence of improper legislative motive, such as the desire to penalize Petitioner for remaining a non-union restaurant." Pet. p.1 In this characterization RUI appears to have mixed and matched equal protection and impairment of contract clause principles in a bizarre manner which bears not even a passing resemblance to the Court of Appeal's scholarly, well-reasoned and meticulously documented opinion. RUI also plays fast and loose with the facts.

As the City has already observed, the Ninth Circuit made it clear throughout that it considers the Marina Amendment to apply to "a number of large Marina businesses" and not just to a single business as RUI repeatedly and erroneously contends. See Pet. 32a. In any event, the "virtually unreviewable discretion" quote of which RUI is so fond is only discussed in the section of the Ninth Circuit opinion that analyzes RUI's claim that a legislative classification confined to larger Marina businesses violates equal protection. The Court made no observations about the City's ability to apply its law to persons with whom the City contracts while discussing equal protection. It is RUI, not the Ninth Circuit, which conflates the analysis of

separate and distinct constitutional provisions, namely the Equal Protection and Contract clauses.

C. There Is No Evidence In The Record To Support A Claim That The Legislation Was Designed To Assist Union Organizing Efforts.

RUI's claim that the City was motivated by attempts to facilitate union organizing efforts is not even supported by its own citations to the record either in the Ninth Circuit or in this Court. In RUI's petition it cites only to a portion of Judge Bybee's dissenting opinion in the Ninth Circuit which it claims is a "summary of the record evidence of Berkeley enacting its challenged Amendment *in order to pressure RUI into becoming a union restaurant.*" (Emphasis supplied.) Pet. App. p. 12, citing Pet. App. 37a-41a. This claim is blatantly false.

Judge Bybee made no such claim that Berkeley adopted its ordinance in order to *"pressure RUI into becoming a union restaurant"*. Judge Bybee began his discussion of the facts in the cited section by noting that "they reveal why the Marina Amendment is an improper exercise of municipal authority that offends the Contract Clause." Pet. App. 37a. Judge Bybee never reached the issue of whether equal protection was violated or thus whether evidence of improper motive was relevant to an equal protection inquiry. "Because I would find that Berkeley has violated the Contract Clause, I do not reach RUI's equal protection and non-delegation claims." Pet. App. 37a, fn.1. At no point in the cited pages did Judge Bybee suggest that the City was trying to force unionization at Skates, a RUI-owned restaurant, or elsewhere. Judge Bybee observed merely that the Marina Zone

amendment was adopted two months after the union asked that the Living Wage ordinance be amended to apply to Marina businesses immediately. Pet. App. 40a-41a.

In making its improper motive claim in the Ninth Circuit, RUI relied only on a declaration filed by a union representative, Stephanie Ruby, who explained that the union had advocated before the City Council for the Marina Amendment and that it was important for the district court to clarify whether the Marina ordinance was constitutional as soon as possible because both the employees and employers in Marina businesses needed to know what minimum wages and benefits employees were entitled to under the Living Wage ordinance. It is this rather modest and unremarkable statement by a union official, when cloaked in RUI's increasingly shrill rhetoric that has taken on the trappings of a nefarious and unconstitutional plot to hijack the legislative process.

It is time for RUI to take a deep breath. The well-known and entirely benign fact is that labor unions have long been advocates for better wages and benefits for employees. These objectives are achieved through enacting legislation, enforcing existing legislation and negotiating collective bargaining agreements, sometimes on parallel tracks. The labor movement has likely advocated for much protective labor legislation adopted at the federal, state or local level in the last century. Similarly, when such protective labor legislation is proposed, businesses just as routinely lobby to avoid or at least temper the law's reach in order to minimize the economic burden on such businesses.

The ability of individuals, or groups, to shape legislation, reflects the vibrancy of a robust democratic process and is hardly evidence of devious subversive forces at work. While the players in this legislative process often level strident accusations that particular legislation has been subverted by opposing "special interests" this rhetoric too is a staple of the democratic process and inevitable. Indeed, attempts to silence the voice of some or all groups affected by proposed legislation would run afoul of the First Amendment. In any event, as the Ninth Circuit correctly noted and this Court has stated "it is entirely irrelevant for constitutional purposes whether the conceived reasons for the challenged [legislative] distinction [challenged on equal protection grounds] actually motivated the legislature." *FCC v. Beach Communications*, 508 U.S. at 315. See Pet. App. 30a. In short, on this point, the Ninth Circuit Opinion was correct on both the law and the facts.

D. In Its Contract Clause Claim, Rui Misstates The Record By Claiming That The Marina Amendment Affected Only One Lessee, Did Not Constitute Legislation And Had A Retroactive Effect.

RUI's contract clause misrepresentations of the facts go even further than its misrepresentations on equal protection. The first misrepresentation is by now a familiar refrain – that the Marina Amendment applied only to a single lessee and thus that the Ninth Circuit opinion "gave *carte blanche* to municipalities unilaterally to rewrite leases and other contracts to which they are a party through the expedient of legislating against *individual businesses . . . one business at a time. . . .* " (Emphasis

supplied.) Pet. pp. 20-21. As the City has exhaustively explained, this is simply not what the Ninth Circuit concluded, based upon undisputed facts introduced by RUI itself into the record. The Marina Amendment applied to a number of larger Marina businesses whether or not RUI chose to ignore the law.

Building upon its first misrepresentation, RUI next claims that since a single business was singled out, the Marina Amendment was not legislation at all and thus cannot be judged by the most relevant United States Supreme Court opinion, *General Motors Corp. v. Romein,* 503 U.S. 183 (1992). Pet. p. 25. In fact, the Ninth Circuit found the City to be engaging in an exercise of the police power when adopting the Marina Amendment. Pet. App. 12a. The Court went on to note that "[t]he power to regulate wages and employment lie clearly within a state's or municipality's police power." Pet. App. 20a.

The RUI leases and subleases claimed to be impaired, in fact, contained provisions in each that required the lessee to comply with all applicable laws of the City. Pet. App. 20a. Such provisions are construed under California law to include not only existing but future laws. Pet. App. 20a. Indeed, at oral argument, RUI counsel agreed that the City could have required RUI to comply with a city-wide minimum wage law, thereby conceding that no impairment existed. Pet. App. 28a. While counsel asserted that a law limited to the Marina was not permissible, such an argument is an equal protection argument not one relating to whether subsequently enacted legislation may be applied to an existing contract. *Id.*

Finally, RUI claims that the Marina Amendment was "retroactive". Pet. 23a. This factual assertion is

incomprehensible. By its terms the ordinance went into effect and governed only future payments of wages and benefits after adoption of the Marina Amendment. No provision of the law purported to require *back* wages or benefits to be raised. Such a law is clearly prospective in effect only. RUI's loose and misleading use of technical terms, such as whether a law is retroactive, is apparently intended to buttress, by rhetoric, what the analysis lacks in actual cogency and persuasiveness on the merits.

III. THE PETITION FAILS TO MEET THE THRESHOLD REQUIREMENTS FOR SEEKING CERTIORARI

Supreme Court Rule 10 provides that certiorari is entirely discretionary and will be granted only for "compelling reasons." The Rule enumerates the character of the reasons that the Court will consider in evaluating a Petition for Writ of Certiorari. RUI tries to bring itself within the ambit of subdivision (a) and (c) of this Rule by claiming that the Ninth Circuit decision conflicts with reported decisions in other circuits or of this Court. Quite to the contrary, the Ninth Circuit decision was meticulous in its application and analysis of each of the key principles of constitutional law raised by the three-pronged attack mounted by RUI in this case. The Ninth Circuit applied all relevant precedent but concluded, based on the application of those cases to the factual record before it, that no constitutional violations were present.

Moreover, resolution of RUI's contract clause claim required the Ninth Circuit to interpret the contract, which was claimed to be impaired by the challenged legislation. Such contract interpretation turned primarily on principles of state law governing contract interpretation and

principles of state constitutional law which prohibit contracting away the police power. Of course, an erroneous determination of fact or a misapplication of state law cannot be the basis of certiorari, as Rule 10 in its last sentence makes clear.

A. The Ninth Circuit Opinion Does Not Conflict With Decisions Of Other Circuits Or The United States Supreme Court On Equal Protection.

RUI's central equal protection theme is that the Ninth Circuit failed to consider or apply case law concerning a "class of one" equal protection claim. Pet. p. 9. The simple answer to this assertion is the very response which the Ninth Circuit itself provided, namely that the Marina Amendment applied to a number of larger Marina businesses and the legislative classification met the rational basis test. Pet. App. 28a-32a. Thus, RUI's entire argument on pages 9-21 is fatally flawed because of its assumption that the Ninth Circuit was evaluating a class of one claim. The undisputed evidence in the record supports the Ninth Circuit's conclusion that RUI's equal protection claim was mounted against a legislative enactment that applied to a class composed of a number of larger Marina businesses. Even assuming that the Ninth Circuit misread the record, such error is not the proper basis for the granting of certiorari under Rule 10. See Rule 10.

In any event, none of the potpourri of equal protection cases which RUI cites conflicts with the Ninth Circuit's opinion. Most cases involving a class of one claim involve a claim that a law was invidiously enforced against a single wrongdoer. For example in the leading case cited by RUI, *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), the

Court established the standard which would govern whether a class of one equal protection claim would pass muster at the pleading stage. The plaintiff there asserted that the Village imposed a land use exaction on them which was more than twice the amount demanded of all others similarly situated and that the Village's demand in this regard was "irrational and wholly arbitrary." The court found this allegation consistent with its prior holdings that a "class of one" plaintiff must allege that she has "been treated differently from others similarly situated and that there is no rational basis for the difference in treatment". *Id.* at 564. The Supreme Court declined to decide whether personal animus was a necessary condition of such a class of one claim. *Id.* at 565.

By contrast, in *Bell v. Duperrault*, 367 F.3d 703, 707-08 (7th Cir. 2004) also cited by RUI, the court found that the challenged enforcement policy had tightened increasingly since 1998 to address environmental considerations and that the plaintiff had not received differential treatment from others similarly situated and the mere fact that he received some inconsiderate or even hostile behavior from one of the government officials did not bring him within a class of one equal protection claim. In similar vein, other such claims have been rejected on their facts and not as a result of analytical confusion on the part of the circuit courts, as RUI suggests. See e.g. *Albierov v. City of Kankakee,* 246 F.3d 927, 932 (7th Cir. 2001) (slum landlord on whose property a sign was posted indicating he was violating city codes, pursuant to a city ordinance "has not offered any evidence that he has been treated differently from other similarly situated landlords."); *Costello v. Mitchell Public School District* 79, 266 F.3d 918-20 (8th Cir. 2001) (plaintiffs' failed to show that removal

of child from special education class had no rational basis). Equal protection claims like any other claimed constitutional violations are necessarily going to turn on the relevant facts and subordinate legal principles particularly applicable to that claim.

Here, the Ninth Circuit applied all the most relevant equal protection principles by giving deference to legislative judgments on purely economic legislation, evaluating whether the law was supported by a rational basis and allowing a legislative body to legislate incrementally to remedy a perceived problem. No conflict with either circuit court or United States Supreme Court precedent is apparent anywhere in the Ninth Circuit's opinion. To the contrary, the Court went to great pains to analyze each argument made by RUI in thorough detail and rejected them mostly on the facts, except where the legal argument was itself at odds with enunciated constitutional doctrine. The dissent did not even reach the equal protection issues and no judges of the Ninth Circuit voted to hear this matter en banc.

B. The Ninth Circuit's Opinion Is Consistent With Circuit Court And United States Supreme Court Cases On The Contract Clause; Resolution Of The Contract Clause Claim Turns Primarily On State Law Principles Governing Contracts

RUI employs the same sleight of hand in its contract clause analysis as it does in its equal protection analysis – first misrepresenting the facts and then bootstrapping the misstated facts into a constitutional violation. As in the case of its equal protection contentions, RUI states first that the Marina Amendment applied to a single business,

and then on this basis claims it is not legislation and thus not subject to the most relevant United States Supreme Court case on the threshold issue of whether the challenged law has even operated on any of the material terms of the allegedly impaired contract. It then goes on to argue, in a mystifying nonsequitur, that the Marina Amendment is retroactive. In an earlier section of this brief, the City demonstrated how each of these factual representations are false. The law applied by the Ninth Circuit is clear and unequivocal and its conclusions turn mainly on the facts and on principles of California contract law.

There is no question that a contract clause challenge must establish, as a threshold matter, that the challenged law has the effect of impairing or affecting the contract claimed to be impaired. RUI conceded in its opening brief in the Ninth Circuit that the threshold legal question in evaluating a Contracts Clause claim is "whether there has been a substantial impairment of a contractual relationship." (Appellant's Opening Br., p.25.)

In *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) the United States Supreme Court further explained that this threshold inquiry is composed of three parts: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." It went on to conclude that General Motors was unable to meet the first two parts of the test because the contract allegedly impaired contained, "no contractual agreement regarding the specific workers' compensation terms allegedly at issue." *Id.* at 186-187.

The very contract clause case cited by RUI makes this same point. "Appellants' Contract Clause challenge to the royalty owner exemption fails for the simple reason that there is nothing to suggest that that exemption nullified any contractual obligations of which appellants were the beneficiaries." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 187 (1983). See Pet. p. 23, fn. 9. The Ninth Circuit concluded that no provision of RUI's lease was affected by the Marina Amendment.

In response, RUI quotes Judge Bybee's dissent at length. Pet. pp. 21-22. Judge Bybee's analytical position is however untenable, namely that enactment of any law not inserted into a contract is an impairment of that contract. This very argument was expressly rejected by this Court. In *Romein*, General Motors argued that prior Michigan law regulating workers' compensation was an implied term of its employment contracts and that the change in that law resulted in an unconstitutional impairment of the employment contracts. The Michigan Supreme Court had already rejected this argument, holding that only those laws which affect the validity, construction or enforcement of a contract became implied terms of the contract.

This Court likewise rejected the proposition that all laws are read into all contracts, pointing out that this approach would protect against all changes in legislation regardless of the effect of those changes on bargained for contracts. *Romein*, 503 U.S. at 190. The Supreme Court noted the potential for employment contracts to incorporate workplace safety regulation, employers' tax obligations and laws prohibiting workplace discrimination. Such a construction "would severely limit the ability of state legislatures to amend their regulatory legislation. Amendments could not take effect until all contracts had expired

and parties could evade regulation by entering into long term contracts." *Id.* In short, it is RUI's argument and not the Ninth Circuit opinion which is at odds with this Court's opinions.

In determining the threshold question of whether RUI's lease had provisions in it which could be said to be affected by the Marina Amendment, the Ninth Circuit looked at the facts and California contract interpretations cases. Pet. App. 16a-22a. Thus, its contract clause conclusion turns more on the facts and California contract law than on any unique or contrary impairment of contract legal principles. As such, this case is simply not an appropriate candidate for certiorari and would end up resolving no legal issue on which there is any conflict between circuits or with the opinions of this Court.

For all the foregoing reasons, the City respectfully prays that this Court deny RUI's petition for a writ of certiorari.

Respectfully submitted,

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No. 04-582

IN THE

Supreme Court of the United States

RUI ONE CORPORATION,

Petitioner,

v.

CITY OF BERKELEY, ET AL.,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

RUI respectfully files this reply to the brief in opposition filed by Respondent City of Berkeley ("Berkeley"). Berkeley's arguments should be rejected. This Court should grant review to address the important and nationally significant constitutional questions presented. *See* Brief of Amici Curiae Chamber of Commerce of the United States of America, National Federation of Independent Business Legal Foundation, The National Restaurant Association, The California Restaurant Association, The Washington Restaurant Association, and The Original Fisherman's Wharf Restaurant Association In Support of Petitioner ("Chamber Brief"); Brief of Washington Legal Foundation as Amicus Curiae In Support of Petitioner ("WLF Brief"); Brief of Amicus Curiae Pacific Legal Foundation In Support of Petitioner.

Berkeley principally argues that this is not a "class of one" case because RUI is not the only business subject to the challenged Amendment to Berkeley's Living Wage Ordinance ("Amendment"). Even if "class of one" claims were dependent on there being literally only one entity or individual in the class being discriminated against, Berkeley's own opposition unwittingly demonstrates that the challenged Amendment, as applied in this case, satisfies this artificial limitation. But this Court's decision in *Village of Willowbrook* explicitly rejects the suggestion that a "class of one" claim depends on there being literally only a single entity or individual subject to discriminatory treatment by the government. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 n.* (2000) (per curiam).

Moreover, Berkeley's argument that there is not enough evidence of improper motive is baseless, as Judge Bybee demonstrated in his dissent. There is significant evidence in the record that Berkeley's passage of the narrowly targeted Amendment was improperly motivated by a desire to promote the organizing efforts of the Hotel Employees & Restaurant Employees Union Local 2850 (the "Union"), which

the panel majority blithely dismissed as "'entirely irrelevant for constitutional purposes.'" Pet. App. 30a. *See* Chamber Brief at 3-5, 7-14.

Berkeley tries to minimize the significance of the circuit split articulated by Judge Posner regarding the standard of proof and the relevance of improper legislative motive in "class of one" cases by addressing only cases in which such claims "have been rejected," purportedly "on their facts." Opp. 12. However, Berkeley never explains how these supposed factual differences account for the different standards applied by different Circuits in the wake of *Village of Willowbrook*. There is, in fact, no accounting for this divergence other than that the Circuits are applying different legal standards. This conflict in the lower courts warrants review by this Court.

Finally, the Ninth Circuit's unduly expansive interpretation of the police powers of Berkeley and other municipalities with respect to their contracting parties cannot be reconciled with the Contract Clause jurisprudence of this Court and other courts and threatens the wholesale abrogation of the contract rights of individual businesses and individuals by municipalities. *See, e.g.*, WLF Brief at 11-14. Simply because a municipality possesses police powers does not justify the unilateral rewriting of its own contracts with third parties. This issue also warrants review by this Court.

I. Plenary Review Of The Panel Majority's Equal Protection Ruling Is Warranted.

Berkeley's principal response to the "class of one" equal protection issue raised in RUI's Petition is as follows: no "class of one" issue exists here because Berkeley's challenged Amendment applies to more businesses than just RUI. *See* Opp. 1-6.

1. Berkeley's own opposition unwittingly belies its assertion that RUI was not the only business to which the Amendment applied for purposes of RUI's equal protection challenge. *Id.* After opening with the dubious assertion that

the Amendment applied to maybe up to "ten" businesses simply because the City mailed out notices to that number of businesses "during the pendency of the legislative process leading to adoption of the challenged amendment," Berkeley is only able to identify "two" other businesses to which the Amendment purportedly could have applied. *Id.* at 1-2 and n.1. Berkeley then tellingly admits that these "two businesses" are *exempt* from the Living Wage Ordinance's ("LWO") requirements because they entered into "collective bargaining agreements" with their employees, *i.e.*, succumbed to Berkeley and the Union's pressure to become union shops. *Id.* Calling RUI a "scofflaw" and "law breaker" for exercising its right to challenge the constitutionality of the Amendment does not change the fact that the Amendment in its practical operation singles out RUI — the only entity against which the City has attempted to enforce its Amendment to the LWO.[1] *Id.* at 3. Doing so does not alter the ample record evidence that clearly demonstrates that the Amendment in effect applies only to RUI. *See, e.g.*, Pet. App. 40a-41a, 53a.

There is no dispute that the Amendment to the LWO is so narrowly drawn as to apply only to a non-union business of a certain size with a certain number of employees in a small, specified geographic area (regardless of whether the collective bargaining agreement sets wages below LWO-mandated levels, as does the Radisson agreement), and it is not contested that only one business fits that bill. Even the panel majority below addressed and ruled upon the merits of RUI's "'class of one' equal protection claim" (albeit erroneously). Pet. App. 31a-32a. It also is not contested that the Amendment applies to existing leases in a retroactive fash-

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[1] There is no basis for Berkeley's use of such pejoratives. Consistent with the district court's order and a stipulation of the parties, RUI has been tracking and escrowing the funds needed to satisfy the Amendment's requirements should the Amendment finally be determined to be constitutional.

ion, unlike the LWO that applies only prospectively to new or amended municipal contracts.

Moreover, Berkeley's contention appears to rest on the fundamental misconception that a "class of one" equal protection claim exists only when a *single* entity is being targeted by the government. *See, e.g.*, Opp. 11 ("Most cases involving a class of one claim involve a claim that a law was invidiously enforced against a *single* wrongdoer.") (emphasis added). This Court has categorically rejected such an unduly constricted approach to equal protection jurisprudence, and has explained that "class of one" is simply a term of art. *See Village of Willowbrook*, 528 U.S. at 564 n.* ("We note that the complaint in this case could be read to allege a class of five. . . . Whether the complaint alleges a class of one or of five is of no consequence. . . .").

2. Because Berkeley's Amendment singles out RUI in its practical operation, it makes little sense to assert, as does Berkeley, that the split Ninth Circuit panel below was simply "closely follow[ing] this Court's own precedent" because the panel majority's opinion quoted – out of context – two words ("virtually unreviewable") from this Court's decision in *FCC v. Beach Cmmunications, Inc.*, 508 U.S. 307, 316 (1993). Opp. 4. This Court did state that legislatures have "virtually unreviewable" discretion "to approach a perceived problem incrementally," but it did so only in the context of a law of *general applicability*, where the ordinary operation of the political process provides some measure of protection against arbitrary and unreasonable impositions by the state upon individual persons and businesses. *See FCC v. Beach Communications*, 508 U.S. at 309 (considering a challenge to an Act of Congress that treated all "facilities that serve separately owned and managed buildings" differently than all facilities "that serve one or more buildings under common ownership or management"). Indeed, as RUI explained in its Petition without contradiction by Berkeley, every equal protection decision of this Court that has upheld a challenged law under rational basis scrutiny dealt with laws of *general applicability*, rather than the kind of narrowly tailored singling-out of

one business for discriminatory treatment effectuated by Berkeley's challenged Amendment. Pet. 18-19.

3. Berkeley does not confine its attempts to dodge the post-*Village of Willowbrook* circuit split described in RUI's Petition to its portrayal of this case as not involving a "class of one" claim. Instead, it also contends that there is "no" record evidence of potentially improper legislative motives that should be considered. Opp. 6. That contention is even more inaccurate than Berkeley's statement that "no judges of the Ninth Circuit voted to hear this matter en banc." Opp. 13; *but see* Pet. App. 87a ("Judge Bybee votes to grant the petition for panel rehearing and petition for rehearing en banc.").

Judge Bybee aptly summarized much of the record evidence of Berkeley's having enacted its challenged Amendment at the urging of the Union to pressure Marina businesses to become union shops. *See* Pet. App. 37a-41a. *See also* Chamber Brief at 3-5, 7-14. Just because Judge Bybee opted to do so in the context of his Contract Clause analysis does not mean that this factual evidence somehow is immaterial to RUI's "class of one" equal protection claim. It is significant that even the panel majority acknowledged that Judge Bybee "cite[d] additional facts" "to establish a supposed nefarious motive on behalf of" Berkeley. Pet. App. 12a, n.7.

It is hardly a coincidence that the challenged Amendment "was adopted two months after the union asked that the Living Wage ordinance be amended to apply to Marina businesses immediately," Opp. 7, that the Amendment to the LWO permits union shops to set wages below the LWO-mandated minimum, that the Amendment applies to only one entity in the City and the only restaurant in the Marina that is non-union, or that "[t]he Union in its request to intervene [in the district court proceedings] admitted that it had 'lobbied for the passage of the Ordinance, including its amendment to ensure its immediate implementation by the businesses on the publicly-owned marina such as Plaintiff's Skates Restaurant.'" Chamber Brief at 4-5 (*quoting* Memorandum in Sup-

port of Motion to Intervene, filed November 13, 2000, *RUI One v. Berkeley* (N.D. Cal. Case No. 00-3878SI), at 2); *see also id.* at 3-5 & n.2 (accurately complementing the description in Judge Bybee's dissent and in RUI's Petition of the record evidence of improper motivation on Berkeley's part in targeting RUI with its Union-driven special-interest legislation). Further evidence of Berkeley's improper motive exists in the record. *See, e.g.*, ER 116, 118-120, 126-29, 380-81, 383-85.

Of course, this Court need not determine whether enough record evidence exists to render the district court's *sua sponte* grant of summary judgment to Berkeley erroneous because the Ninth Circuit panel majority repeatedly held that any such evidence would be irrelevant as a matter of law to RUI's equal protection claim. *See, e.g.*, Pet. App. 12a-13a, n.7 (stating that the "additional facts" "introduced" by "the dissent" "to establish a supposed nefarious motive on behalf of the City Council" "are *wholly irrelevant*, . . . as our analysis of the constitutionality of an ordinance must proceed from the text of the ordinance, not the alleged motives behind it") (emphasis added) (citations omitted); Pet. App. 30a (stating that "'it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature'") (citation omitted).

4. Such a holding aligns the Ninth Circuit with some decisions of the Second Circuit, but against at least the Fifth, Seventh, Tenth, and Eleventh Circuits, insofar as the relevance of improper motive to "class of one" equal protection claims is concerned. Pet. 14-16 (quoting Judge Posner's description of this circuit split).

Berkeley's only real response to this circuit split consists of a thoroughly underwhelming attempt to distinguish "on their facts" only a small subset of the cases cited by Judge Posner – and only those cases in which the equal protection claim was rejected. Opp. 12-13. Yet, Berkeley never explains how these purported factual differences amongst the handful of cases it cites account for the different standards

that have been applied by different Circuits in the wake of *Village of Willowbrook*.

Furthermore, Berkeley never addresses the conflict between the Ninth and Seventh Circuits over whether the availability, or the extent of judicial scrutiny, of a "class of one" equal protection claim depends upon the claimant's "vulnerability." *See* Pet. 16-18 (citing cases).

II. The Panel Majority's Flawed Contract Clause Ruling Also Warrants This Court's Plenary Review.

Berkeley seeks to evade review by arguing that this Court's decision in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), authorizes it to impose any law upon RUI as long as it does not directly abrogate an *explicit* contractual term, and that, regardless, any unilateral contractual changes are permitted by municipal police powers. Berkeley cites extensively the conclusions of the divided Ninth Circuit panel.

The majority below misapplied this Court's and other courts' precedents and gave Berkeley and other municipalities free rein unilaterally to rewrite their contracts. Review by this Court is necessary to protect individuals and individual businesses against such an unfettered exercise of municipal power and to protect the sanctity of municipal contracts. As the Washington Legal Foundation argued in its amicus brief, "the issue here is whether [Berkeley's] police powers permit [it] to adopt an ordinance imposing vastly higher wage scales on a single employer, particularly when, as here, the city's hook for imposing the ordinance is that it has an existing contractual relationship with the employer yet it failed to seek the higher wages as part of the contractual bargaining process." WLF Brief at 5.

Berkeley misconstrues this Court's decision in *Romein* to require an identical match between the literal terms of the contract and the new law. However, *Romein* rejects such a requirement, and recognizes that "express or implied" terms

can be unconstitutionally impaired. *Romein*, 503 U.S. at 188. That nothing in the lease specifically refers to "living wages" or "living wage ordinances" per se is not dispositive. Pet. App. 6a-7a.

Berkeley goes further and contends that because "no provision of RUI's lease was *affected* by the Marina Amendment," it is free to apply the Amendment to a single business such as RUI. Opp. 15 (emphasis added). Berkeley simply ignores the fact that the Amendment "affect[s]" a number of provisions of the lease.[2] More importantly, the Amendment impairs an express or implied right "so central to the bargained-for exchange between the parties," *Romein*, 503 U.S. at 188-89: the rent and other obligations assumed by RUI in exchange for the right to occupy and enjoy the "unique location and amenities" of the property. This right – which Berkeley cited and relied upon in negotiating RUI's rent obligation – is *precisely* the right cited by Berkeley in support of the *new* obligation imposed on RUI through the Amendment. ER 404, 108; Pet. App. 29a, 30a, 61a, 81a.

Unlike the law at issue in *Romein*, Berkeley's Amendment is *not* a law of general applicability. *Compare Romein*, 503 U.S. at 183-84 (challenging state law provisions that governed a comprehensive, *statewide* workers' compensation system). The Amendment is precisely the type of "special interest" legislation targeting a single entity for discriminatory treatment that warrants more exacting scrutiny under the Contract Clause. *See, e.g.*, Pet. 22-23 (citing cases).

Review by this Court is essential to prevent Berkeley and other municipalities from using the Ninth Circuit's split decision, combined with broad invocations of their police power, to authorize the wholesale abrogation of contract rights. Berkeley "cannot avoid Contract Clause analysis merely by

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[2] The lease expressly references RUI's obligation to "maintain adequate personnel," Pet. App. 62a, "employ its best judgment, efforts and abilities" to maximize profits and enhance the Berkeley Marina, *id.* at 13a, and charge "reasonable" rates consistent with charges for similar merchandise or services in this area. *Id.*

establishing that the [challenged] ordinance is an otherwise legitimate exercise of police power." *Southern Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 893 (9th Cir. 2003).

Finally, Berkeley's suggestion that the Ninth Circuit panel majority's decision turned on issues of "California contract law" is bereft of merit. Opp. 16. As this Court has explained, "[t]he question whether a contract was made is a federal question for purposes of Contract Clause analysis . . . ." *Romein*, 503 U.S. at 187 (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938))." Pet. App. 42a-43a. The federal issues presented by RUI's Contract Clause claim are "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, . . . whether the impairment is substantial," *Romein*, 503 U.S. at 186, and whether the impairment "is reasonable and necessary to serve an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977).

This Court has drawn the important distinction between "generally applicable rule[s] of conduct," *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191-92 (1983), that remedy "broad, generalized economic or social problem[s]," *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978), and laws that have "a very narrow focus" and are "aimed at specific" parties. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.13 (1983). The Amendment here is in the latter category.

CONCLUSION

This Court should grant plenary review of the Ninth Circuit's divided ruling in this case.

Respectfully submitted.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, THE NATIONAL RESTAURANT ASSOCIATION, THE CALIFORNIA RESTAURANT ASSOCIATION, THE WASHINGTON RESTAURANT ASSOCIATION, AND THE ORIGINAL FISHERMAN'S WHARF RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENTS OF INTEREST OF AMICI

The Chamber of Commerce of the United States of America ("Chamber"), The National Federation of Independent Business ("NFIB") Legal Foundation, The National Restaurant Association ("NRA"), The California Restaurant Association ("CRA"), The Washington Restaurant Association ("WRA") and The Original Fisherman's Wharf Restaurant Association ("FWRA") submit this brief in support of Petitioner RUI One Corporation ("RUI").[1]

The Chamber is the world's largest business federation. The Chamber represents more than three million businesses and organizations in every size, sector and geographic region of the country. The Chamber represents the interests of its members in litigation, raising issues of widespread concern to American businesses.

The NFIB Legal Foundation is the legal arm of the NFIB, the Nation's oldest and largest organization dedicated to representing the interests of small business owners throughout all 50 states. The approximately 600,000 NFIB members own a wide variety of small businesses, including restaurants, neighborhood retailers, service companies and manufacturers. The NFIB Legal Foundation is a nonprofit public interest law firm established to protect the rights of America's small business owners.

Founded in 1919, the National Restaurant Association is the leading business association for the restaurant industry. The NRA's mission is to represent,

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* file this brief with the consent of the parties. Evidence of consent is filed concurrently with the brief. *Amici* disclose pursuant to Supreme Court Rule 37.6 that no counsel of any party authored any part of this brief, and no person or entity, other than the listed *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief.

educate and promote a rapidly growing industry of 878,000 businesses employing 12 million people. The NRA's 60,000 member companies represent more than 300,000 restaurants.

The CRA was founded in 1906 and represents more than 20,000 businesses throughout California. The CRA's mission includes voicing the California restaurant industry's concerns.

For 75 years, the WRA has been the leading business association for Washington's restaurant industry. The WRA represents more than 4,000 businesses. The 11,000 restaurant businesses are Washington's largest private employer, each year contributing 8.4 billion dollars to the state economy, generating 474 million dollars in state taxes, and paying employees more than 2.3 billion dollars.

The FWRA represents restaurants operating at the historic Fisherman's Wharf in San Francisco, California. Fisherman's Wharf is just a few miles from Petitioner's restaurant.

The restaurant industry includes more than 878,000 employers, which employ over 12 million employees, making it the largest private sector employer in the country. The restaurant association *amici* have joined here to speak with one voice about the serious consequences of the Ninth Circuit's "virtually unreviewable" standard of review applied to local laws targeted against individual businesses. The court of appeals' standard will allow unions and other special interest groups to advocate with impunity legislation aimed at intimidating or retaliating against those with diverging political or economic interests.

STATEMENT OF THE CASE

In 1999, the City of Berkeley ("Berkeley" or the "City") commissioned a living wage analysis (the "Analysis") to evaluate the impact of establishing a living wage ordinance

(the "LWO"). *See RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1158 (9th Cir. 2004) (Bybee, J., dissenting). The Analysis included the financial impact of imposing a living wage on the City's lessees, including a small group operating near the Berkeley Marina. The author of the Analysis concluded that because applying a living wage ordinance to Marina businesses would have a "major impact," the City "should consider rent adjustment times for triggering living wage requirements." *Id.* at 1159. The author warned the City that Marina lessees "may demand reduced rent if they are required to comply with the living wage ordinance." *Id.*

In May 2000, the Berkeley City Manager issued his recommendations to the City Council. The City Manager noted the "living wage advocacy community" was urging the City Council to apply the proposed living wage ordinance to businesses operating at the Berkeley Marina (the "Marina Zone"). *Id.* The City Manager issued a follow-up recommendation against applying the ordinance to the Marina Zone, stating "[t]hose leases most targeted by the living wage advocates, the Marina leases, do not have open negotiations for anywhere from 10-15 years." *Id.* The "living wage advocates" actually was Respondent The Hotel Employees & Restaurant Employees Union Local 2850 ("Union"), which was attempting to organize workers at the Radisson Hotel located on the Berkeley Marina. *See Id.* at 1160.

On June 27, 2000, the City adopted a living wage ordinance ("LWO"). *Id.* at 1159. Covered employers were required to pay workers $11.37 hourly if they elected not to provide employer-sponsored healthcare, and to give employees twenty-two (22) days off annually, of which twelve (12) were paid days off. *Id.* at 1159. The ordinance exempted employers who negotiated union collective bargaining agreements (CBAs), regardless of whether wages and benefits under the CBA met the LWO's minimum standards. *Id.* at 1159. Consistent with the Analysis, Berkeley did not apply the LWO to its existing lessees,

choosing instead to apply the LWO to businesses with leases commenced or renegotiated after its effective date. *Id.* at 1160.

In July 2000 the Union again asked the City Council to adopt a "Marina Zone ordinance." *Id.* at 1160. The Union even asked the City Council to "restructure" workloads at the City Attorney's office to do so. *Id.* In response to pressure from the Union, on September 19, 2000, the City Council adopted Ordinance No. 6583-N.S. ("the Marina Amendment"), which mandated that all businesses of a qualifying size within the Marina Zone were immediately subject to the LWO. *Id.* at 1160.

Petitioner RUI, one of three businesses targeted by the Marina Amendment, had such an existing lease with Berkeley. RUI had renegotiated its lease with the City in 1996. The parties bargained for such items as a $50,000 grease trap, $7,000 landscaping, and compliance with the City's nondiscrimination policies. The parties also agreed to insert an integration clause into the lease. The lease said nothing about mandatory wages or benefits. *Id.* at 1162.

On October 19, 2000, RUI sued the City, arguing in part that the Marina Amendment violated the Equal Protection and Contract Clauses of the United States Constitution. Four days after the City answered, the Union filed a motion to intervene.[2] The Union in its request to intervene admitted that it had "lobbied for the passage of the Ordinance, including its amendment to ensure its immediate implementation by the businesses on the publicly-owned marina such as Plaintiff's Skates Restaurant." Memorandum in Support of Motion to

[2] The Ninth Circuit majority below incorrectly noted the Union intervened "over one year after this litigation was commenced." Opinion at Pet. App. 14a. The Union was an active party from the outset of RUI's challenge, further demonstrating the true intent behind the Marina Amendment.

Intervene, filed November 13, 2000, RUI One v. Berkeley (N.D. Cal. Case No. 00-3878SI), at 2. The Union believed the failure to apply the ordinance to non-union Marina employers would provide the Union "employers with the incentive to reduce their compensation in the next round of contract negotiations." Declaration of Stephanie Ruby in Support of Motion to Intervene, filed November 13, 2000, RUI One v. Berkeley (N.D. Cal. Case No. 00-3878SI), at 2. As such, the Union wished to strengthen its position in collective bargaining agreement ("CBA") negotiations, including its initial CBA negotiations with the Radisson.

SUMMARY OF ARGUMENT

1. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution ensures similarly situated persons and businesses are treated consistently. *See* U.S. Const., amend. XIV, § 1. Courts must be vigilant in assuring that legislation applicable only to one or a small group of businesses is enacted for an appropriate purpose. Here, Berkeley targeted a few employers to help the Union. The Union even drafted the challenged legislation and secured a complete exemption from the living wage ordinance for unionized employers, regardless of whether wages under the collective bargaining agreement met the threshold imposed on non-union employers. The Union's/Berkeley's articulated justification for the law had little to no relationship to the actual reason these employers were selected.

2. Judicial scrutiny of narrow-cast legislation provides some protection from laws passed at the behest of special interests for the purpose of harming their foes. The checks and balances present when governments pass laws of general applicability are absent when the legislature passes a law targeting one or two businesses. By allowing Berkeley to unilaterally impose lease terms it failed to win at the bargaining table, the Ninth Circuit abdicated its duty to review and gave municipalities unfettered power to target individual businesses. The court below injected an alarming degree of uncertainty

into every municipal contract. Small and large businesses alike must have some assurance that state and local governments will not add or fundamentally alter contractual provisions. Although this case involves a city government succumbing to the demands of organized labor, the next case could involve virtually any special interest and any political agenda.

3. The opinion below is an aberration. The court below chose to apply to "class of one" challenges the traditional Equal Protection Clause test applied to laws of general applicability, *i.e.*, a law will survive an equal protection challenge so long as there is "'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *RUI One*, 371 at 1154 (*quoting FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). That deferential analysis should not be applied in "class of one" cases. As Justice Breyer noted in his concurrence in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000), illegal motivation *is relevant* to establishing equal protection violations when an ordinance targets a class of one. *Id.* at 565-66 (Breyer, J., concurring). The majority in *Olech* did not find it necessary to consider the issue of subjective motivation, because the plaintiffs had made out an equal protection violation by showing that they were treated differently from those similarly situated and that the treatment was irrational and arbitrary. Lower courts have struggled to apply *Olech*. But each circuit to have considered the issue (including the Ninth Circuit in a decision issued after the opinion below) recognizes a plaintiff can establish an equal protection violation by establishing disparate treatment based on an impermissible motive. Some lower courts have adopted Justice Breyer's concurrence in *Olech* and have *required* "class of one" plaintiffs to establish an improper motive. Others, including the Ninth Circuit itself, have held *Olech* created an alternative test, whereby "class of one" challenges may be asserted *either* by proving improper motive *or* an irrational relationship between the legislation and its stated purpose.

4. The Ninth Circuit's complete refusal to even consider the City's actual motivation warrants this Court's attention. The evidence established the Marina Amendment was motivated by the Union's desire to organize RUI's employees. The City thus violated well-settled principles of federal labor law by taking sides in an ongoing labor dispute and altering the delicate balance of power between employers and unions. Berkeley's patently unlawful purpose in passing the Marina Amendment, imposing the LWO on non-union Marina lessees while exempting other lessees until lease renegotiation time, establishes a violation of the Equal Protection Clause.

5. The court of appeals' Contract Clause analysis also is flawed. Courts ordinarily apply special scrutiny when state or local governments use their legislative power to inject new terms into their own contracts. To appease the Union, the City passed an ordinance directed only at a couple of its lessees. In doing so, Berkeley violated the Contract Clause. For that reason as well, the Court should grant RUI One's Petition for Certiorari.

ARGUMENT

I. The Ninth Circuit's Opinion Effectively Eliminates Judicial Review of Legislation Intended to Injure A Politically Unpopular Business

A. The Ninth Circuit Refused to Consider Berkeley's Improper Motive

RUI demonstrated the Union targeted the Marina businesses for two unlawful reasons. First, the Marina Amendment assisted the Union in its efforts to win an NLRB election at the Radisson Hotel. Because the LWO essentially required wages and benefits commensurate with the Union's demands, and the LWO exempted unionized employers, applying the LWO to the Radisson in effect eliminated the hotel's concerns about unionizing. Second, the Union targeted Petitioner's restaurant to eliminate a wage disparity with the unionized HS Lordships restaurant. As the Union

chief explained to the Berkeley City Manager, the Marina Amendment would eliminate HS Lordships' argument for seeking a wage concession during contract negotiations.

Judge Bybee in the dissent below cited the record evidence demonstrating the City's pro-union motivation. *RUI, supra*, 371 F.3d at 1160 (Bybee, J., dissenting). Refusing to even *consider* the City's improper animus, the majority below concluded:

> Although the dissent cites additional facts that it states "reveal why the Marina Amendment is an improper exercise of municipal authority," . . . these facts are introduced solely to establish a supposed nefarious motive on behalf of the City Council. *Such facts are wholly irrelevant, however, as our analysis of the constitutionality of an ordinance must proceed from the text of the ordinance, not the alleged motives behind it. See Golden State Transit Corp. v. City of Los Angeles*, 686 F.2d 758, 761 (9th Cir. 1982) ("It is well settled that a reviewing court 'will not strike down an otherwise constitutional statute on the basis of an allegedly illicit legislative motive.'") (*quoting United States v. O'Brien*, 391 U.S. 367, 383 (1968)).[3]

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[3] The Ninth Circuit's reliance on its decision in *Golden State* is odd, as this Court reviewed and rejected the Ninth Circuit's rationale in that case. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 610-611, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986). In *Golden State*, the teamsters pressured the Los Angeles City Council to condition renewal of taxi leases on settlement of a labor dispute. *Golden State*, 475 U.S. at 610-611. The Council contended it was only attempting to ensure "quality taxicab service and adequate compensation for taxicab drivers." *Golden State, supra*, 686 F.2d at 761. In vacating a lower court injunction based on the Council's "true purpose," the Ninth Circuit argued that courts are "not permitted to inquire into alleged motives of legislators." *Id.* at 759. This Court rejected that argument and found the legislation was preempted because the city had attempted to alter parties' bargaining positions in an ongoing labor dispute. *Golden State, supra*, 475 U.S. at 618. The same principle applies to Berkeley's passage of the Marina Amendment.

RUI, supra, 371 F.3d at 1146 n. 7 (emphasis added).

Thus, ignoring the City's improper purpose, the panel's majority instead reviewed the legislation to determine "whether there is 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* at 1154 (*quoting FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). RUI therefore had the burden of negating "every conceivable basis which might support" the Marina Amendment. *Id.* at 1155 (*quoting Lehnhanusen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

The majority briefly acknowledged "class of one" challenges, which it held were based on intentional disparate treatment with no rational basis. *Id.* at 1156. The majority, however, completely ignored "ill will" or "improper motive" as a basis for the challenge, contrary to and in conflict with courts throughout the country and this Court's *Olech* decision.

B. The Ninth Circuit's Refusal to Consider Improper Motive Deepens a Conflict Among the Circuits and Is Contrary to Supreme Court Precedent

In *Village of Willowbrook v. Olech, supra*, the Olechs alleged the Village of Willowbrook conditioned approval of access to the municipal water supply on a discriminatory easement because the couple had previously sued the village. 528 U.S. at 563. The Seventh Circuit upheld the Olechs' Equal Protection Clause challenge, "holding that a plaintiff can allege an equal protection violation by asserting that state action was motivated solely by a 'spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective.'" *Olech, supra*, 528 U.S. at 564 (*quoting* 160 F.3d 386, 387 (7th Cir. 1998)).

This Court held that individuals can bring "class of one" Equal Protection Clause claims regardless of membership in a class or group. *Id.* at 565. Although this Court upheld the Seventh Circuit's decision, the case was decided under a

traditional Equal Protection Clause analysis, whereby "the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* at 564. (citations omitted). Therefore, this Court found it unnecessary to address the viability of the Seventh Circuit's "alternative theory" based on "subjective ill will." Justice Breyer concurred in *Olech* based on evidence the village acted with "vindictive action," "illegitimate animus," or "ill will." *Id.* at 565-66 (Breyer, J., concurring).

The decision at bench conflicts with the Ninth Circuit's own later decision in *Squaw Valley Development Company v. Goldberg*, 375 F.3d 936 (9th Cir. 2004). The Ninth Circuit concurred with the Second and Fifth Circuits, allowing "class of one" "selective enforcement" equal protection claims, based on an argument the government action was motivated by an improper purpose. The court held that a plaintiff may survive summary judgment on an Equal Protection claim by "creating a triable issue of fact that either: (1) the proffered rational basis was objectively false; or (2) the defendant actually acted based on an improper motive." *Squaw Valley, supra*, 375 F.3d at 946 (reversing grant of summary judgment based on disputed facts concerning impermissible motive).

The Seventh Circuit noted following *Olech* that "[t]he role of motive is left unclear. . . ." *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000). Although this Court expressly declined to reach the "alternative" ill will argument relied on by Justice Breyer, the Seventh Circuit has assumed the Court affirmed its requirement that ill will motivate the decision. *Id.* at 1008.

The First Circuit reviews subjective motivation when analyzing "class of one" challenges. In *Tapalian v. Tusino*, 377 F.3d 1 (1st Cir. 2004), the court upheld a verdict in favor of a contactor subjected to onerous construction requirements for allegedly failing to provide the public works superintendent with female companionship. The court held that to state a valid equal protection claim, Tapalian had to

prove that "'compared to others similarly situated, [he] was selectively treated . . . based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" *Id.* at 6 (*quoting Barrington Cove Ltd. P'ship v. R.I. Hous. and Mortgage Fin. Corp.*, 246 F.3d 1, 7 (1st Cir. 2001)).

The Sixth Circuit has recognized that, after *Olech*, "class of one" challengers can succeed *either* by demonstrating the action had "no rational basis" *or* by demonstrating the government actor had "a bad reason" for the alleged disparate treatment. *Boone v. Spurgess*, 385 F.3d 923, 932 (6th Cir. 2004). Similarly, the Tenth Circuit recognized an alternate "class of one" argument where plaintiffs can demonstrate they were subject to disparate treatment due to some "animosity." *See Bartell v. Aurora Public Schools*, 263 F.3d 1143, 1149 (10th Cir. 2001).

The Second Circuit has held that it is not necessary to prove malice or bad faith as part of a "class of one" violation. *See Harlen Associates v. Village of Mineola*, 273 F.3d 494, 499-500 (2nd Cir. 2001) (recognizing circuit split). That court also has confirmed that "class of one" challenges based on impermissible motive can be brought as "selective enforcement" claims. *See African Trade & Information Center, Inc. v. Gates*, 294 F.3d 355 (2nd Cir. 2002) (recognizing the plaintiffs could proceed under a selective enforcement challenge by demonstrating "impermissible" motive); *see also Cobb v. Pozzi*, 363 F.3d 89, 109 (2nd Cir. 2003) (recognizing "two related, yet different, equal protection arguments").[4]

[4] The Fifth Circuit also categorizes "impermissible motive" challenges as "selective enforcement" claims. *See Beeler v. Rounsavall*, 328 F.3d 813, 817 (5th Cir. 2003).

C. The Marina Amendment Violated the Equal Protection Clause

1. Berkeley Passed the Marina Amendment to Assist the Union

Employers often oppose union organizing drives because they perceive recognizing a union will increase costs. The Marina Amendment was nothing more than the Union's obtaining from Berkeley assistance with its organizing and bargaining efforts. By having the City Council apply the LWO to Marina businesses, the Union forced the Radisson Hotel to raise wages and confer benefits regardless of whether the hotel employees were unionized. As such, the Radisson had less incentive to oppose the Union's organizing efforts. In addition, the Union had successfully lobbied to exempt unionized employers from the LWO. As such, by recognizing the Union, the Radisson could avoid the LWO's mandatory leave, wage, and benefit requirements.

As the Union noted when it advocated the Marina Amendment, applying the LWO to the non-union Marina restaurants would strengthen the Union's bargaining position with HS Lordships, a unionized Marina restaurant. Without the Marina Amendment, the Union feared that HS Lordships would insist on wage concessions during contract negotiations.

Berkeley's conduct in the instant case is part of a broader trend. Unions increasingly have enlisted the assistance of sympathetic state and local governments to fatten their membership rolls. In 2000, for example, the California Legislature enacted Assembly Bill 1889 which, among other prohibitions, forbade employers leasing state property from opposing union organizing campaigns on such property. *See* Cal. Govt. Code § 16645.5. AB 1889 also prohibited government contractors or employers receiving state reimbursement from using state funds to oppose union organizing drives. *See id.* § 16645.7. The Ninth Circuit struck down the law, recognizing that when reviewing legislation that alters the power balance between unions and

employers, the focus is on the "statute's function, not its form." *Chamber of Commerce of U.S. v. Lockyer*, 364 F.3d 1154, 1167 (9th Cir. 2004), *pet. for reh'g filed*. Had the Ninth Circuit applied the "function over form" standard to the Marina Amendment, it surely would have struck it down.

2. Berkeley's Assistance to the Union Violated Federal Labor Law

Just as California illegally chose sides in favor of union organizing when it passed AB 1889, albeit on a grander scale, Berkeley enacted the Marina Amendment to assist the Union's organizing and negotiating efforts at the Marina. Berkeley's conduct violates federal labor law, thereby establishing Berkeley (1) treated Petitioner different from other existing non-union lessees by applying the LWO to Petitioner and (2) an illegal motivation behind the disparity – unlawful assistance to the Union, there is a sufficient basis for a challenge under the Equal Protection Clause.

Congress passed the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* to create a uniform body of federal labor law. In *Lodge 76, IAM, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976), this Court recognized the NLRA mandates that the "'free play of economic forces,'" controls the balance of power between unions and employers, without inference by government regulation. *Id.* at 140 (*quoting NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)). In short, "[n]o state or federal official or governmental entity can alter the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1993); *see also Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir. 1996) ("'[T]he crucial inquiry regarding preemption is . . . whether the exercise of plenary state authority to *curtail* or *entirely prohibit* self-help would frustrate

effective implementation of the Act's processes.'") (emphasis added) (*quoting Golden State, supra*, 475 U.S. at 615).

As this Court recognized, "'[f]ree collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA.'" *Golden State, supra*, 475 U.S. at 619 (*quoting New York Tel. Co. v. New York Labor Dept.*, 440 U.S. at 551 (Powell, J., dissenting)). Local governments simply cannot become parties to collective bargaining negotiations by introducing or altering a standard of properly "balanced" bargaining power. *Id.*

Berkeley unabashedly passed the Marina Amendment to help the Union achieve its organizing and bargaining goals. The Ninth Circuit deemed the uncontroverted evidence as irrelevant. Had the Ninth Circuit considered this evidence, the Marina Amendment could not have withstood judicial review. Finally, the Ninth Circuit has departed from a large body of case law in finding irrelevant Berkeley's unlawful motivation. This Court therefore should grant the Petition.

3. The Marina Amendment Fails Even Traditional Equal Protection Clause Analysis Because There Is No Rational Basis for the City's Differential Treatment

The Marina Amendment fails *even* under the Ninth Circuit's erroneous construction of the Equal Protection Clause. The Ninth Circuit has recognized that to satisfy the test of "any reasonably conceivable set of facts that could provide a rational basis," the challenging party must demonstrate the law does not "rationally further[] a legitimate state purpose." *Seariver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002). Moreover, "there is no rational basis for state action 'that is malicious, irrational or plainly arbitrary.'" *Squaw Valley, supra*, 375 F.3d at 945.

As a general proposition, the efficacy of living wage ordinances is dubious.[5] The small businesses that drive this economy cannot sustain the enormous burden they impose. Living wage legislation actually results in more productive, but fewer, employees. The most effective response to increased wages is to constrict a workforce to maintain labor costs. Although living wage proponents allege the cost is merely transferred to customers, in reality the only competitive choice is to terminate employees. Otherwise, the one competitor who opts to pass on costs to customers rather than adjust labor costs will soon find itself terminating its entire workforce in a business closure.

This case, however, does not involve living wage ordinances *generally*. The Marina Amendment fails review because it ultimately singled out one, non-union, Marina lessee – Petitioner – for malicious, irrational, and arbitrary reasons. There is no rational basis for believing that Berkeley would effectively combat poverty by targeting RUI. *See Zobel v. Williams*, 457 U.S. 55, 63, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982) (the differential treatment must further the asserted interest). HS Lordships was exempt as a unionized employer. Thus, the Marina Amendment actually affected just two employers – RUI and the Radisson Hotel. Once the Radisson unionized, only RUI was affected by the Marina Amendment, which was the Union's intent all along. Berkeley failed to articulate any rational basis for targeting RUI as a remedy for Berkeley's working poor, as there is no proof that RUI's employees were poor in the first place.

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[5] The Pacific Legal Foundation, a fellow *amicus*, provides extensive specific information demonstrating the disadvantages of living wage ordinances generally.

D. The Ninth Circuit's "Class of One" Standard Eviscerates Equal Protection Guarantees

The *amici* represent thousands of small employers who look to the courts for protection from targeted legislation and selective prosecution. Reviewing courts must be permitted to look beyond mere stated objectives to the true intent behind targeted governmental action. Otherwise, a municipality may avoid scrutiny by merely articulating a false benign purpose. Here, Berkeley chose to assist a union. The combinations of victims and improper motivation are virtually limitless. Thus, if a municipality decided a company that "outsourced" work to India should be punished, the decision below allows the government to pass a "living wage" ordinance against that business, perhaps imposing an exorbitant living wage as punishment for the outsourcing. A city could impose a punitive "living wage" ordinance against a single gun shop or adult theater, so long as the articulated reason was to provide help to the poor. Cities could hold up building permit approvals, reject license applications, increase property taxes, or selectively enforce building or health codes all under the guise of some facially rational purpose. In short, courts must not abandon their duty to protect individuals and businesses from malicious or improper governmental acts.

II. Berkeley Violated the Contract Clause by Legislating a Retroactive Amendment to a Negotiated Lease

The Ninth Circuit rejected RUI's claim that the Marina Amendment violated the Contract Clause by impairing Berkeley's lease with RUI. The dissent below correctly concluded that by legislating a new contract term, Berkeley violated the Contract Clause.

The Contract Clause prohibits the passing of laws that impair obligation of contracts. U.S. Const. art. I, §10,

cl. 1. Under the established three-step analysis, courts first determine whether the law in question substantially impairs a contractual relationship. *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983). If so, the State must demonstrate the law has "a significant and legitimate public purpose . . . such as the remedying of a broad and general social or economic problem. . . ." *Id.* at 411-12. Requiring legislatures to demonstrate a broader social purpose helps assure that "the State is exercising its police power, rather than providing a benefit to special interests." *Id.* An otherwise proper law will nevertheless be stricken if the impairment is unreasonable or inappropriate. *Id.* at 412-13.

The majority below held that the Marina Amendment did not substantially impair any contract term. Judge Bybee disagreed, recognizing that because Berkeley was a party to the very contract allegedly impaired, the court was justified in applying a "stringent examination." *RUI, supra*, 317 F.3d at 1157-58 (Bybee, J., dissenting) (*quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n. 15 (1978)). Berkeley legislated lease terms that it failed to negotiate. Prior to the Union's involvement, there is no indication the City even considered applying the LWO to Marina businesses before their leases were renegotiated.

Judge Bybee aptly noted that the Marina Amendment impaired RUI's lease agreement in several key respects. Most significantly, it added a contract term not previously contained within the "four corners" of the parties' lease agreement. *Id.* at 1161. Because RUI's lease contained an integration clause, the parties were prohibited from subsequently modifying the contract terms without a new agreement. *Id.* (citation omitted). The lease did include employer/employee issues, such as a clause requiring RUI to comply with the City's non-discrimination policies and a provision requiring that RUI "maintain adequate personnel for the efficient service of customers." Thus, Berkeley retroactively and unilaterally amended its lease with Petitioner.

The lease required RUI to "employ its best judgment, efforts and abilities to operate the business in a manner calculated to produce the maximum profitable volume of sales, rents and transactions maintainable. . . ." RUI estimates that complying with the Marina Amendment would increase annual labor costs by $121,000. As Judge Bybee noted, "[a]n increase in RUI's cost of operating Skates is a severe impairment that defeats the expectations of the parties under the contract." *Id.* at 1164 (*quoting Cont'l Illinois Nat'l Bank & Trust Co. v. Washington*, 696 F.2d 692, 700 (9th Cir. 1983)).

The majority found that Berkeley was immune from scrutiny because it acted within its police power in setting minimum wages. *Id.* at 1153-54. However, as Judge Bybee observed, the Marina Amendment was not a law of general applicability, where there would be greater public scrutiny to ensure the legislation was not motivated by an improper purpose. The Marina Amendment was targeted legislation aimed at one non-union lessee. Viewed correctly, Berkeley was a landlord with the power to make law.

Businesses must have some assurance that their contracts with local governments will not be subsequently modified to appease the desires of the politically powerful. When Berkeley and RUI entered into a lease in 1996, both parties considered the restaurant's operating expense as a touchstone for calculating an appropriate rent. By acceding to the Union's demands and applying the LWO to a business opposing the union's goals, Berkeley imposed a new onerous burden on RUI and substantially impaired existing lease provisions.

CONCLUSION

The Ninth Circuit's refusal to consider Berkeley's unlawful motive for targeting Marina businesses is inconsistent with circuit precedent from around the country, including the Ninth Circuit's own later decision in *Squaw Valley Dev. Co.*, 375 F.3d 936. In addition, following this Court's decision in *Olech*, the circuit courts widely diverge

on how to consider improper motivation in Equal Protection Clause cases, particularly those involving one or a few class members. This Court should thus grant certiorari both to reverse the judgment of the court below and clarify an increasingly divergent body of circuit precedent. Additionally, the Ninth Circuit's decision to permit the City of Berkeley to substantially impair its lease with RUI through targeted legislation should be reviewed and reversed. Businesses' ability to rely on the terms of contracts with state and local governments lies at the heart of the Contract Clause.

Respectfully submitted,

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In the

Supreme Court of the United States

RUI ONE CORP., a Washington corporation,

Petitioner,

v.

CITY OF BERKELEY, et al.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. The Equal Protection Clause requires that regulations of economic pursuits be "rationally related to a legitimate government interest." This Court has explained that under this standard "we insist on knowing the relation between the classification adopted and the object to be attained . . . . [and] a law will be sustained if it can be said to advance a legitimate government interest." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Did the court below err in holding that the rational relationship standard gives the legislature "virtually unreviewable" discretion to regulate economic matters? *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1155 (9th Cir. 2004).

2. A city law applying to only one business requires that the business pay employees $11.37 per hour. Is this rationally related to the government's interest in alleviating the plight of the working poor?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and economic freedom. PLF's Economic Liberty Project protects the right to earn a living both through direct litigation and by participating as amicus curiae in appellate courts. PLF has participated as amicus curiae in cases such as *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) and *Bank of America v. San Francisco*, 309 F.3d 551 (9th Cir. 2002). PLF also participated as amicus in support of the petition for rehearing in this case. Because of its history and expertise with regard to economic liberty and the right to earn a living, PLF believes its perspective will aid this Court in considering the petition for certiorari.

SUMMARY OF ARGUMENT

The Berkeley Living Wage Ordinance ("LWO") requires any business leasing property from the city, employing more than six people, generating $350,000 in annual income, and which does not already have a collective bargaining agreement with a union, to pay its employees $11.37 per hour (or, if it provides employees with health benefits, $9.75 per hour). The Marina Amendment, which is challenged here, expanded the LWO to apply to that property in the city's Marina area which

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been lodged with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

is held by the city in trust. The *only* business subject to the Marina Amendment, and perhaps the only business to which the LWO applies at all, is Skates on The Bay, a restaurant operated by Petitioner, RUI Corp. *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1166 (9th Cir. 2004) (Bybee, J., dissenting).

This violates the Equal Protection Clause of the Fourteenth Amendment. First, the LWO singles out a narrow class to which it exclusively applies, violating the principle that laws should apply equally to all similarly situated parties. Although the language of the LWO is written so as to appear neutral, in fact it applies to a narrow minority targeted because of its political differences with the City. Namely, the refusal to unionize. *Cf. Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Second, it treats RUI differently from other businesses with no rational basis in protecting the health, safety and welfare of the people. The public welfare is not aided by applying the LWO to only a single employer in the city, or by allowing the employer to escape its requirements—and even to pay their employees less than the LWO amount—if it executes a collective bargaining agreement with the Hotel Restaurant Employees Local 2850 (hereafter "the union"). Indeed the LWOs bears no rational connection to the city's asserted interest in improving the standard of living, because its actual effeet is to stifle job creation and raise prices of goods, which harms the working poor.

The Ninth Circuit dismissed RUI's Equal Protection argument with an explicit refusal to engage in any analysis, rational basis or otherwise. This refusal presents an important question of federal law that conflicts with this Court's decisions in *Romer v. Evans*, 517 U.S. 620, 632 (1996), *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985), *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 (1973), and others. Courts cannot blindly accept whatever justification for a law the government proffers. Rather, those

cases have held that courts must make a serious, though not strict, analysis of whether the law rationally furthers a legitimate state interest. The "anything-goes" non-scrutiny applied by the Ninth Circuit majority is that which Justice Stevens has characterized as "tantamount to no review at all," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in judgment), and which this Court has expressly repudiated.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE WRIT TO SETTLE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE RATIONAL BASIS TEST IS A GENUINE LEGAL STANDARD OR IS "TOOTHLESS"

A. The Ninth Circuit Disregarded this Court's Jurisprudence by Upholding a Law That Singles Out a Small Disfavored Class to Bear an Unequal Burden

The Ninth Circuit rejected RUI's Equal Protection argument because it held that the City's decision to single out RUI was "'virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.'" 371 F.3d at 1155 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993)). But this expands the rational relationship standard far beyond what this Court and other circuit courts have held that test requires. Even under the rational basis test, a court must review the connection between the law and its stated purpose.

While it is certainly true that the government may solve problems incrementally, 371 F.3d at 1155, this must not become an excuse for unfairly burdening discrete and insular minorities. " 'Equal protection of the laws is not achieved

through indiscriminate imposition of inequalities.'" *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)).

In *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), this Court struck down a federal law which declared any household containing a person unrelated to another member of that household ineligible to receive food stamps. The Court held that the law was subject to rational basis scrutiny, and therefore it had to "rationally further some legitimate governmental interest," *id.* at 534, to be upheld. But the Court found that the law did not "rationally further" a legitimate interest. Although the government claimed that the law was necessary to "minimiz[e] fraud," *id.* at 535, the Court rejected "the Government's conclusion that the denial of essential federal food assistance to all otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns." *Id.* at 535-36.

Romer v. Evans, 517 U.S. 620 (1996), also held that courts employing the rational basis test must assess whether a law rationally furthers a legitimate interest:

> even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained . . . . [A law must be] narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it serve[s]. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Id. at 632-33. *Accord, City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985); *Zobel v. Williams*, 457

U.S. 55, 61-63 (1982). *See also Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002).

The panel engaged in no serious analysis of RUI's Equal Protection argument. By simply asserting that the rational basis test makes a law "virtually unreviewable," and failing to discuss the subject further, the panel transformed the rational basis test into "no review at all." *Beach Communications*, 508 U.S. at 323 n.3 (Stevens, J., concurring in judgment). *See also United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 180 (1980) (Stevens, J., concurring in judgment) ("if any 'conceivable basis' for a discriminatory classification will repel a constitutional attack . . . judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do . . . . [T]he Constitution requires something more . . . . "). The rational basis test is designed to give legislators room to act—not to give them a blank check or government power.

As Judge Birch of the Eleventh Circuit recently explained, *Romer* "stand[s] for the proposition that when all the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. And animus *alone* cannot constitute a legitimate government interest." *Lofton v. Sec'y of the Dep't of Children & Family Services*, 377 F.3d 1275, 1280 (11th Cir. 2004) (Birch, J., concurring in denial of rehearing). The correct rational basis analysis in this case would have been to determine at the outset whether requiring *only* RUI to pay its employees almost $12 per hour actually does, to some degree, bear a rational connection to redressing what Judge Wardlaw called the "skyrocket[ing]" cost of living. 371 F.3d at 1141. As explained *infra*, Part II.A-B, the answer to that question is *no*.

Once that is established, it becomes clear that the Marina Amendment is a narrowly targeted law, singling out a disfavored minority for burdensome treatment simply because of its political unpopularity. As the dissent below noted, "[t]he

smallness of the burdened class" suggests that the Marina Amendment "does not serve a broad social purpose." *Id.* at 1169. The majority below misapplied the rational basis test. This Court should grant review to clarify that the rational basis test "although deferential, 'is not a toothless one,' " *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of America, UAW*, 485 U.S. 360, 375 (1988) (quoting *Mathews v. De Castro*, 429 U.S. 181, 185 (1976)), and to resolve the conflict between the Ninth Circuit, this Court's Equal Protection jurisprudence, and at least one Circuit Court. *See Craigmiles*, 312 F.3d at 225 (equal protection does not allow government to burden disfavored class for no legitimate public purpose).

B. The Ninth Circuit's "Anything Goes" Scrutiny Contradicts this Court's Holding That Rational Basis Review Bars Governors from Imposing Unequal Burdens on Disfavored Minorities

Just as Congress improperly singled out a disfavored group to bear an unfair burden in *Moreno*, *supra*, and thus violated the Equal Protection Clause, the City of Berkeley violated the Clause by targeting a single disfavored group to bear the burden of paying above market wages.

Laws written in superficially general terms, but which in fact single out a particular person or group for disfavorable treatment, violate Equal Protection. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court struck down a licensing law which applied to all laundry shops in San Francisco. The law did not facially discriminate against the Chinese; all laundry facilities were subject to it. *Id.* at 368. But because the law was really "directed .... exclusively against a particular class of persons," *id.* at 373, this violated the Constitution:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and

> administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Id. at 373-74. *See also Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879) ("The class character of this legislation is none the less manifest because of [its] general terms . . . .") As Justice Stevens more recently put it,

> while political considerations may properly influence the decisions of our elected officials, when such decisions disadvantage members of a minority group—whether the minority is defined by its members' race, religion, or political affiliation—they must rest on a neutral predicate . . . . The Constitution enforces "a commitment to the law's neutrality where the rights of persons are at stake."

Vieth v. Jubelirer, 124 S. Ct. 1769, 1808 (2004) (Stevens, J., dissenting) (quoting *Romer*, 517 U.S. at 623).

The *Yick Wo* Court did not hold that unequal treatment was legitimate simply because "mere" economic rights were at issue. On the contrary, the Court recognized that economic freedom is among the most precious rights that people possess. *See* 118 U.S. at 370. When government singles out a party to bear a particular economic burden, the burden violates the Constitution no less than other types of burdens.

The purpose of the rational basis test is to allow legislators to solve problems within their purview even when the solutions are partial or imperfect, without interference by unelected judges. It was not designed to insulate lawmakers from judicial review and allow them to abuse their authority under the guise of protecting the public. Only a basic means-ends scrutiny,

such as the court applied in *Romer*, *Cleburne*, *Moreno*, and other cases, can accomplish that.

C. Allowing Companies to Escape the LWO if They Have Collective Bargaining Agreements Violates Equal Protection

The Marina Amendment also violates the Equal Protection Clause by a tax on businesses that do not execute collective bargaining agreements with the union.

In *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), the plaintiffs argued that the City of San Bernardino targeted their buildings for selective enforcement of building codes as part of a campaign to condemn their land and transfer it to a developer the City favored. *See* 75 F.3d at 1314-15. The ninth circuit held that "creat[ing] an irrational distinction between property owners whose properties the City wanted to acquire and other property owners . . . lacks any rational basis and that the [City's] conduct, if proved at trial, would constitute a violation of the plaintiffs' clearly established rights under the equal protection clause." *Id.* at 1326-27. Like the landowners in *Armendariz*, RUI has been singled out by the City to force it to contract with the union.

The Ninth Circuit rejected the equal protection argument on the grounds that the escape provision was a " 'familiar and narrowly drawn opt-out provision[].' " 371 F.3d at 1157 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994)). But the opt-out provision here is neither familiar, nor narrowly drawn. It is not familiar, because while opt-out provisions in general exist to ensure that employees attain the benefits of collective bargaining, without being effectively priced out of the labor market, *this* opt-out provision is designed to manipulate a particular employer into bargaining with the union. Special legislation, targeting one particular party, is not "familiar." *See Romer*, 517 U.S. at 633 ("laws singling out a certain class of citizens for disfavored legal status or general

hardships are rare.") Nor is it narrowly drawn, because the LWO allows RUI to escape if it signs a *collective* bargaining agreement, but not if it signs an agreement with a *particular employee*. This means that some individuals who might "reach an agreement with the employer for certain employee benefits and employment conditions that they consider superior to, but incompatible with, the Living Wage Ordinance," may not form a contract to that effect—while the labor union can. 371 F.3d at 1157. Thus the opt-out is over-inclusive. Employees who would choose not to participate in a labor union, and would like to work for less than the LWO amount, are deprived of the opportunity to do so.

It is said that Henry Ford told customers they could have the Model T in any color they wanted, so long as it was black. The City of Berkeley has told employers in the Marina District that they may contract with whomever they wish, so long as it is the union. This sort of special interest legislation violates the Equal Protection Clause. *Cf. Craigmiles*, 312 F.3d at 224 ("protecting a discrete interest group from economic competition is not a legitimate governmental purpose.")

D. The Ninth Circuit Erred by Not Evaluating the Actual Effect of the LWO

The panel rejected RUI's argument that it was being singled out as a "class of one." 371 F.3d at 1155-56 (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)). It held that "[i]t was certainly rational . . . for the City to treat larger Marina businesses differently from their competitors outside the Marina," *id.*, due to the City's maintenance of the Public Trust Marina area; the unique amenities of the Marina area; and because the public has a "limited choice of businesses to patronize" in the Marina. *Id.* at 1144-45.

But none of these justifications bear any relationship to the *purpose of the ordinance*. In *Moreno*, *supra*, the Court rejected

the government's complete denial of foodstamps to households including non-related persons because this did not "constitute[] a rational effort to deal with the[] concern[]" of fraud and abuse in the food stamp program. 413 U.S. at 535-36. In *Romer*, the Court held that the rational basis test requires "some relation between the classification *and the purpose it serve[s].*" 517 U.S. at 632-33 (emphasis added). It is always possible to list characteristics which distinguish one business from another, or one locale from another, but this does not address the question of whether categorizing the businesses by location bears a rational basis to the *asserted purpose of the law*, which in this case, is to remedy the plight of the working poor in Berkeley.

In *Cleburne*, *supra*, the Court held that the Equal Protection Clause was violated when the City refused to permit the construction of a home for the mentally retarded. In defending its decision, the City pointed out that the mentally retarded are not "similarly situated" to those who are not mentally retarded. "It is true," the Court concluded,

> that the mentally retarded as a group are indeed different from others not sharing their misfortune . . . . *But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.*

473 U.S. at 448 (emphasis added).

In other words, the court below erred by holding that the mere existence of a difference between Skates on The Bay's site and other locations in the city permits unequal treatment. Simply listing the differences between the Marina area and other places in the City does not justify the City in treating it differently. Rather, even under rational basis scrutiny, the distinction must be relevant to the legitimate government

interest so that the distinction *itself* rationally *furthers* that interest. *See further Zobel*, 457 U.S. at 61-63 (striking down residency requirement under rational basis test because it did not "rationally serve[]" the law's asserted interest); *Moreno*, 413 U.S. at 537 ("in practical effect, the challenged classification simply does not operate so as rationally to further the government interest"); *Armendariz*, 75 F.3d at 1328 (equal protection claim exists where plaintiffs "allege that city officials treated them differently . . . for a purpose unrelated to the government's interest in the activity employed to target them.").

The Berkeley LWO cannot "rationally further" the purpose of aiding the working poor, *cf. Moreno*, 413 U.S. at 534, because beneficiaries of the LWO are not the working poor, but the union. In fact, the national campaign advocating LWOs is led by labor unions. *See* Employment Policy Foundation, *Union Oversight of the Living Wage Movement*.[2] Unions employ minimum wage laws and LWOs to exclude competition and thus raise their own wages.

> [T]he people who testify before Congress in favor of a higher minimum wage . . . are not representatives of the poor people. They are mostly representatives of organized labor . . . . No member of their unions works for a wage anywhere close to the legal minimum. Despite all their rhetoric about helping the poor, they favor an ever higher minimum wage as a way to protect the members of their unions from competition.

Milton and Rose Friedman, *Free To Choose* 237 (Harvest/HBJ 1990) (1979). The same is true of the LWO, which was spearheaded by the Intervenors in this case. *See, e.g.*, Charles Burress, *Berkeley Council to Hear Competing 'Living Wage'*

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[2] *Available at* http://www.livingwageresearch.org/factsheets/unions.asp

Proposals, S.F. Chron., Mar. 15, 1999, at A13, *available at* 1999 WL 2682258 ("[City] Council member Kriss Worthington . . . said he and his co-sponsors were asked by a local labor union, Hotel Restaurant Employees Local 2850, to propose the plan.").

But the Equal Protection clause requires that

> First, courts must be prepared to declare some ends, such as economic protectionism, illegitimate. Second, in order to separate legitimate from illegitimate ends, and to ensure that legislatures do not regulate too broadly or legislate for the benefit of private parties, courts must require some fit between means and ends that is based in fact, rather than fancy. Certainly courts should not assume a roving commission to second-guess a legislature's motives, but neither should they ignore the obvious.

Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 204 (2003). Cases like *Moreno*, *Cleburne*, *Romer*, and *Craigmiles* reveal that a genuine rationality review requires just such an analysis.

II

THE COURT BELOW ERRED BY NOT APPLYING AN "ANIMUS"-BASED REVIEW UNDER THE EQUAL PROTECTION CLAUSE

While simultaneously criticizing RUI for relying on "*Lochner*-era" cases which imposed policy preferences from the bench, *see* 371 F.3d at 1151, 1157, the court below extolled at length the alleged policy virtues of ordinances requiring above-market wages. *See id.* at 1141-46. But in fact, LWOs and minimum wage laws harm the working poor. Although Judge Bybee was correct that "[t]he desirability of living wage laws is . . . irrelevant," *id.* at 1164, the majority's recitation of the policy justifications for the LWO reveal that the panel was

influenced by such considerations. Moreover, the fact that such laws necessarily harm the very people the City claims to be helping reveals that the law lacks a rational basis in protecting the public welfare.

A. LWOs and Minimum Wage Laws Make It Illegal to Hire People Who Want Jobs

As the Chairman of President Clinton's Council of Economic Advisors, Joseph Stiglitz, has explained,

> If the government attempts to raise the minimum wage higher than the [market] wage, the demand for workers will be reduced and the supply increased. There will be an excess of supply of labor. Of course, those who are lucky enough to get a job will be better off at the higher wage . . . but there are others . . . who cannot find employment and are worse off . . . .

Joseph E. Stiglitz, *Economics* 130-33 (1993) (quoted in Richard K. Vedder & Lowell Gallaway, *Does the Minimum Wage Reduce Poverty?* (Employment Policies Institute 2001)[3] at 2).

The primary problem with minimum wage laws or LWOs is that they increase the wages for those who are employed by making it more expensive for employers to hire others. Thus union members' wages are increased, but only at the cost of artificially restricting the labor supply—by increasing unemployment, and deterring job creation. As Nobel Laureate Milton Friedman put it, a law like the LWO

> requires employers to discriminate against persons with low skills . . . . Take a poorly educated teenager with little skill whose services are worth, say, only $2.00 an hour. He or she might be eager to work for that wage in order toe acquire greater skills that

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[3] *Available at* http://www.epionline.org/studies/vedder_06-2001.pdf

> would permit a better job. The law says that such a person may be hired only if the employer is willing to pay him or her (in 1979) $2.90 an hour. Unless an employer is willing to add 90 cents in charity to the $2.00 that the person's services are worth, the teenager will not be employed. *It has always been a mystery to us why a young person is better off unemployed from a job that would pay $2.90 an hour than employed at a job that does pay $2.00 an hour.*

Milton and Rose Friedman, *Free To Choose* 237 (New York: Harvest 1990) (1979) (emphasis added).

The LWO restricts the labor market "to the exclusive possession of the reduced number of workers who can be employed at the higher wage rates" George Reisman, *Capitalism: A Treatise on Economics* 382 (1996). Because this class includes a disproportionate number of racial minorities, they are the primary victims of laws which prohibit employers from hiring people at low wages. This is why Dr. Friedman has called minimum wage laws "the most antiblack laws on the books." Friedman, *supra* at 238. *See also* Mark Turner & Berna Demiralp, *Higher Minimum Wages Harm Minority and Inner-City Teens* at 2 (Employment Policies Institute 2000)[4] ("black and Hispanic teens initially enrolled and employed are 33.7 percentage points more likely to become idle following a $1 minimum wage increase."). It is certainly regrettable that some people earn low wages, but *making it more expensive to hire people is not a rational way to get them jobs.*

Research confirms these economic predictions. Although LWOs have not been around long enough for definitive research to be completed, observed job loss from minimum wage laws strongly suggests that similar results will follow

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[4] *Available at* http://www.epionline.org/studies/turner_09-2000.pdf

from the Berkeley LWO. *See, e.g.*, Donald Deere, *et al.*, *Sense and Nonsense on the Minimum Wage*, Regulation, Winter 1995[5] ("The percentage of all teenage men with jobs fell from 43 percent before the minimum wage increase to 36.3 percent after—a 6.7 percentage point decline in employment of teenage men."). A 2000 study found that a 10 percent increase in the minimum wage causes a two to six percent decrease in teenage employment. And authors of a 2000 study found that a 10 percent increase in the minimum wage would result in an 8.5 percent decrease in employment for black teenagers. Craig Garthwaite, *Testimony Before the House Subcommittee on Workforce, Empowerment, and Government Programs*, Apr. 29, 2004, at 28-29.[6] The general consensus among economists is that the minimum wage "will not decrease poverty and will limit the employment opportunities of the least skilled . . . push[ing] them further into a life of poverty and government dependence." *Id.* at 34.

> First among the reasons given for raising the minimum wage . . . is to assist the working poor . . . . [But i]f it is possible to mandate high wages, then why not also have low prices for food, shelter, clothing, and everything else that is good? Minimum wage laws focus on wages, not employment; if someone is employed, then he will receive at least the guaranteed wage . . . . The reduction in employment that results from increases in the minimum wage, which is concentrated among those workers with the fewest skills, is the cruel "dark side" of such legislation.

Deere, *et al.*, *supra*.

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[5] *Available at* http://www.cato.org/pubs/regulation/reg18n1c.html

[6] *Available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:94112.pdf

"[M]inimum wage laws can be perverse in their effects," concludes economist Simon Rottenberg. "On the surface, they will appear to many to raise the wages of the working poor. Scratch the surface, and it can be seen that such laws can have opposite consequences. They can move low-wage workers to unemployment and to less desirable employments . . . [and] regressively redistribute income from the poorer workers to those who are better off . . . ." *The Economics of Legal Minimum Wages* 6 (Simon Rottenberg ed., 1981).

All of this research simply confirms the obvious point that "an artificial increase in the price of something causes less of it to be purchased." Deere, *supra*.

There is much reason to believe that the unemployment caused by minimum wages will be mimicked by LWOs. A 1999 study by the Employment Policies Institute found that a hypothetical $10.75 LWO for the entire state of California could cost over 600,000 jobs, of which 48.9 percent would be Hispanic, and 39.4 percent would be high-school dropouts. 41.8 percent of this projected job loss would be in service occupations and 29.2 percent would be in blue collar jobs. Employment Policies Institute, *The Employment Impact of a Comprehensive Living Wage Law: Evidence from California* at 4-5 (1999)[7]. Even a study by an author favorable to LWOs admitted that they "reduce employment among the affected workers. In particular, the estimates indicate that a 50 percent increase in the living wage would reduce the employment rate for workers in the bottom tenth . . . by 7 percent, or 2.8 percentage points." David Neumark, *How Living Wage Laws*

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[7] *Available at* http://www.epionline.org/studies/macpherson_06-2002.pdf

Affect Low-Wage Workers and Low-Income Families (Public Policy Institute of California, 2002)[8] at viii.

In short, "living wage laws . . . are accompanied by disemployment effects among the potentially affected workers, pointing to tradeoffs between wages and employment. This is what economic theory would lead us to expect . . . ." *Id.* at 86-87. The absence of a rational basis in the current LWO is demonstrated by the fact that while a business may escape the LWO—and may pay its employees less than $11.37 per hour—if it executes a *collective* bargaining agreement with a union, it is not allowed to escape the LWO by executing a *private* agreement with a willing employee. This is because, were employers and employees allowed to reach agreements between themselves as to wages, some employees wish to work for less than $11.37 per hour.

B. LWOs and Minimum Wage Laws Raise the Cost of Living for the Working Poor

Minimum wages and LWOs harm the poor in other ways, too. First, minimum wage increases often do not reach the poor, since, on average, "[m]inimum wage workers are not parents struggling to feed their children. Rather, they are high school or college students living at home . . . . Only 9.2 percent of poor people of working age have full-time jobs." United States Congress Joint Economic Committee Report: *The Case Against a Higher Minimum Wage* (1996)[9]. *See also* Margaret O'Brien-Strain & Thomas MaCurdy, *Increasing the Minimum Wage: California's Winners and Losers* vii (Public Policy

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[8] *Available at* http://www.ppic.org/content/pubs/R_302DNR.pdf

[9] *Available at* http://www.house.gov/jec/cost-gov/regs/minimum/against/against.htm

Institute of California, 2000)[10] ("40 percent of families with the highest income receive 34 percent of the additional earnings [under a minimum wage]."); Richard H. Sander, *et al.*, *The Economic and Distributional Consequences of the Santa Monica Minimum Wage Ordinance* (Employment Policies Institute, 2002)[11] (under proposed Santa Monica LWO, only 7 cents of every dollar would go to a low-income worker.) Neither minimum wages nor LWOs remedy the effects of poverty. *See* Vedder, *supra*, at 16 (finding "virtually no meaningful evidence that higher minimum wages reduce poverty in the United States.").

Second, LWOs and minimum wages cause inflation. Since businesses must cover the increased cost of paying employees, they are forced to raise their prices. As with all inflation, the primary victims are the poor. Wealthy people tend to buy their products at high-end stores or producers who already pay their employees more than the legal minimum, while poorer members of society shop at stores that pay their employees minimum wage. O'Brien-Strain & MaCurdy, *supra*, at vii. Thus the price increases which offset minimum wage increases—and would offset the Berkeley LWO, if it applied to more than just one business—hit the poor hardest.

> On average, each California family pays $113 more per year for their purchases following the minimum wage increase. The exact amount . . . varies by income . . . . The richest 20 percent of families pay 34 percent of the costs for the minimum wage, where as the poorest 40 percent carry 25 percent of the burden . . . . In other words, the minimum wage imposes a higher effective price increase on the set

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[10] *Available at* http://www.ppic.org/content/pubs/R_500MOR.pdf

[11] *Available at* http://www.epionline.org/studies/sander_10-2002.pdf.

> of goods low-income families buy than it imposes on the set of goods higher-income families buy.

Id. at 37-40.

Of course, the Berkeley LWO does not apply to all jobs in the City—on the contrary, it may *only* apply to RUI. But this was intended either to offset, or to obscure, the fact that LWOs necessarily create significant costs to employers, which deter employment and raise the cost of living. *See id.* at 1159 (Bybee, J., dissenting) (citing "Greenwich study"). Limiting the Berkeley LWO to a very small class of businesses creates an illusion that the LWO helps the poor. As economist Carl Horowitz points out, studies like the Greenwich Study "demonstrate the viability of the living wage only by removing it from the context of the entire local workforce. That is, the authors are not in a position to consider what would happen if the living wage were applied to the entire local workforce . . . ." Carl F. Horowitz, *Keeping the Poor Poor: The Dark Side of the Living Wage*, Cato Institute Policy Analysis No. 493, Oct. 21, 2003,[12] at 5.

With so much evidence showing that minimum wages and LWOs are at best ineffective and at worst, seriously harm the poor by increasing unemployment and inflation, conscientious observers might wonder why the advocacy of LWOs continues. But "a partial explanation of the frequently narrow coverage of living wage laws is that such narrow laws—even if they fail to deliver benefits to low-wage workers or low-income families—benefit unionized municipal workers." Neumark, *supra*, at ix.

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[12] *Available at* http://www.cato.org/pubs/pas/pa493.pdf

CONCLUSION

The court below applied an "anything goes" level of rationality review to the LWO ordinance. Which is not warranted by this Court's decisions. Proper rationality review, while not strict, nevertheless requires an analysis of whether the LWO rationally furthers the City's asserted interest in protecting the public. The LWO, however, cannot rationally be said to aid the working poor.

The petition for a writ of certiorari should be *granted.*

DATED: November, 2004.

Respectfully submitted,

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No. 04-582

IN THE
Supreme Court of the United States

RUI ONE CORPORATION,
Petitioner,
v.
CITY OF BERKELEY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief, as has counsel for Respondent City of Berkeley. Counsel for Respondent Hotel Employees & Restaurant Employees Local 2850 declined to consent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states, including many in California. WLF regularly appears before federal and state courts to

promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to protecting the property rights and contractual rights of private citizens. *See, e.g., Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, *cert. denied*, 124 S. Ct. 466 (2003); *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

WLF fully supports Petitioner's request that the Court grant review of both of the Questions Presented in this Petition. WLF writes separately in order to emphasize its particular concern over the second Question Presented and the Ninth Circuit's apparent willingness to tolerate legal regimes that unquestionably frustrate the reasonable expectations of those who enter into contracts with municipalities. WLF is concerned that the decision below provides an easy roadmap to any government agency seeking methods of obtaining from government contractors concessions that it is unable to obtain during the contract bargaining process.

WLF is filing this brief because of its interest in promoting the welfare of the business community and the public at large; it has no interest, financial or other, in the outcome of this lawsuit. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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December 1, 2004

QUESTION PRESENTED

Amicus curiae addresses the following issue only:

Whether the City of Berkeley's narrowly targeted amendment of its "living wage" ordinance violates the Contract Clause because that amendment imposes significant new contractual obligations upon Petitioner that Berkeley had failed to secure in recent renegotiations of its lease with Petitioner.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

This case tests whether the Constitution imposes restraints on the power of a municipality to impose on one of its lessees substantial financial obligations that are in addition to those bargained for under the lease.

Petitioner RUI One Corporation ("RUI") operates a restaurant and lounge in Berkeley, California in an area known as the Berkeley Marina. RUI's restaurant sits on land owned by Respondent City of Berkeley; RUI occupies the land pursuant to a long-term lease whose 50-year term does not expire until 2017. The lease requires RUI to construct and maintain "a major first-class restaurant and cocktail lounge" at the site and to pay rent. The lease initially set annual rent payments at the greater of $11,400 or 2.5% of the restaurant's annual gross receipts. The lease was renegotiated in 1996 to increase that percentage to 3.0% and eventually (starting in 2007) to 3.3%. During the 1996 renegotiation, RUI also acceded to Berkeley's requests to install a grease trap (at RUI's expense) and to pay for new landscaping. Berkeley did not seek during the 1996 renegotiation to add any lease provisions dealing with employee pay or benefits. The lease prohibited RUI from discriminating with regard to "rates of pay or other forms of compensation."

In June 2004, Berkeley adopted its first "living wage" ordinance (the "LWO"). The LWO required companies entering into new leases or contracts with the City to agree to provide their employees a minimum wage and benefits package that was far higher than minimum wages imposed under federal and California law. The LWO further provided that companies that had entered into collective bargaining agreements with their employees could be excepted from the LWO's requirements. Because the LWO applied

prospectively only (*i.e.*, only to those companies entering into *new* leases or contracts), it had no effect on RUI's lease.

The Hotel Employees & Restaurant Employees Union Local 2850 soon thereafter began lobbying the Berkeley City Council to expand the scope of the LWO to provide retrospective coverage for several large hotel/restaurant employers (including RUI) that leased land from Berkeley on the Marina. In response, Berkeley amended the LWO in October 2000 (the "Marina Amendment"). The Marina Amendment expanded coverage of the LWO to include large, non-union employers located at the Marina; unlike the LWO, the Marina Amendment applied retroactively to existing lessees. Ultimately, RUI was the *only* company affected by the Marina Amendment, because the one or two other companies that might have been affected were unionized and thus exempted. Although RUI introduced substantial evidence that the Marina Amendment was adopted explicitly to target RUI and to punish it for being a non-union company, the lower courts deemed that factual issue irrelevant to the legal issues before it and thus made no factual findings on the issue. Pet. App. 12a-13a n.7. RUI has estimated the additional costs imposed on it by the Marina Amendment at $121,000 per year.

In October 2000, RUI filed suit in federal district court, alleging *inter alia* that the Marina Amendment violated its rights under the Contract Clause, U.S. Const., art. I, § 10, cl. 1; and the Fourteenth Amendment's Equal Protection Clause. In March 2002, the district court denied RUI's motion for summary judgment and granted summary judgment to Berkeley. Pet. App. 67a-84a.

In June 2004, the Ninth Circuit affirmed by a 2-1 vote. *Id.* 1a-66a. The majority denied RUI's Contract Clause claim, *id.* 14a-28a, finding that RUI had "failed to show that any

provision of its lease agreement with the City was impaired, much less substantially impaired, by the Marina Agreement." *Id.* 27a. The majority held not only that the lease could not reasonably be interpreted as preventing Berkeley from mandating increased wage and benefit payments during the lease term, but also that "such a contract term would be void as against public policy" because "'the legislature cannot bargain away the police power of a State.'" *Id.* at 19a (quoting *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977)). While acknowledging that courts apply decreased deference to government acts when hearing Contract Clause claims if the government itself is one of the contracting parties, the majority held that that decreased deference is inapplicable in determining whether a contract right has been substantially impaired: "The government's supposed self-interest is simply not relevant to the factual determinations prerequisite to a finding on this threshold issue -- formation, terms and impairment." *Id.* 25a. The majority also upheld the rejection of RUI's equal protection claim. *Id.* 28a-33a.

Judge Bybee dissented, finding that the Marina Amendment violated RUI's rights under the Contract Clause. *Id.* 36a-66a. As he read the RUI lease, "Berkeley promised not to impose unilaterally higher wage and benefit costs on RUI." *Id.* 44a. He found, "Berkeley's tacit recognition that it could not alter the terms of existing leases was evident in its applying the original LWO to prospective leases only." *Id.* 45a. He would have held that "the Contract Clause protects such implied contractual terms." *Id.* Rejecting the majority's contrary conclusion, he stated, "Under the principle adopted by the majority, there is no end to the terms that Berkeley might legislatively rewrite, so long as they are not covered by 'specific terms' in the lease." *Id.* 47a. Judge Bybee went on to hold that the Marina Amendment's impairment of RUI's lease was "substantial," *id.* 52a; that the Amendment could not

be justified as "a valid exercise of police power" because it was neither generally nor prospectively applicable, *id.* 55a; and that the Amendment did not serve a significant and legitimate public purpose. *Id.* 56a-63a.

REASONS FOR GRANTING THE PETITION

This case raises Contract Clause issues of exceptional importance. As Judge Bybee noted, and the Ninth Circuit majority did not seriously dispute, "Berkeley used its sovereign authority to achieve what it failed to negotiate in its proprietary capacity." *Id.* 46a. The majority found nothing constitutionally problematic in Berkeley's behavior; it viewed Berkeley's conduct as justified by its police-power authority to protect workers within the city by regulating employment relationships. Indeed, no one seriously disputes Berkeley's power to adopt a generally applicable "living wage" law. But the issue here is whether such police powers permit a city to adopt an ordinance imposing vastly higher wage scales on a single employer, particularly when, as here, the city's hook for imposing the ordinance is that it has an existing contractual relationship with the employer yet it failed to seek the higher wages as part of the contractual bargaining process.

Review is warranted because the Ninth Circuit's ruling goes to the heart of the long-simmering debate over whether the Contract Clause has a meaningful role to play in protecting economic liberty in this nation. The Ninth Circuit's ruling places that court in the camp of those who view most efforts to enforce the Contract Clause with suspicion, as an effort to revive the *Lochner* era's substantive due process protection of economic rights. Those sharing that view argue strenuously that the Contract Clause's prohibition on contract impairments "must be accommodated to the inherent police power of the State to safeguard the vital interests of its people." *Energy*

Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983).[2]

Those who support more muscular enforcement of Contract Clause fully agree that contractual rights must give way in appropriate circumstances to the government's need to protect the public. *See, e.g.*, Richard A. Epstein, "Toward a Revitalization of the Contract Clause," 51 U. CHI. L. REV. 703 (1984). But the danger posed by decisions such as the Ninth Circuit's decision is that they could soon render the Contract Clause a dead letter. By upholding Berkeley's conduct in this case, the Ninth Circuit has essentially provided a government agency with an easy-to-follow roadmap for obtaining from individual government contractors concessions that it did not obtain during the contract bargaining process. By eliminating any requirement that police powers be exercised through adoption of generally applicable ordinances and by narrowly construing what constitutes a contract impairment, the Ninth Circuit has largely deprived government contractors of the ability to bargain for contract terms that protect them from the vagaries of shifting public policy.

Review is also warranted because the decision below conflicts with this Court's case law. In particular, the decision conflicts with this Court's repeated admonitions in Contract Clause cases that government regulations are to be treated less deferentially when the regulations are alleged to impair rights arising from a contract to which (as here) the government is a party. The decision also conflicts with this Court's understanding of what constitutes a contract impairment.

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[2] The Contract Clause provides: "No State shall * * * pass any * * * Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1.

I. REVIEW IS WARRANTED BECAUSE THE CASE PROVIDES AN EXCELLENT VEHICLE FOR RE-EXAMINING THE ROLE OF THE CONTRACT CLAUSE IN PROTECTING ECONOMIC RIGHTS

WLF fully supports RUI's effort to obtain review on both of the Questions Presented by the Petition. RUI has ably demonstrated that the Ninth Circuit's approach to class-of-one equal protection claims sharply conflicts with the approach of other circuits and that resolution of that conflict is appropriate. It has also demonstrated that the Ninth Circuit's approach is inconsistent with this Court's decision in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

WLF nonetheless focuses this brief solely on the Contract Clause issue because it believes both that cases of this sort are most appropriately resolved under the Contract Clause and because this case is a particularly suitable vehicle for exploring the continued role of the Contract Clause in protecting economic rights. When the government establishes rules that apply only to one person or a very small group of people, and there is evidence suggesting that the government has employed improper criteria in singling out the person or persons, rights arising under the Equal Protection Clause undoubtedly come into play. But where, as here, the person singled out alleges that the government rules impair his contractual rights, the Contract Clause speaks to the issue with much more specificity than does the Equal Protection Clause. Because the two clauses are intended to protect similar interests (in general, to protect individuals from arbitrary treatment at the hands of state government), it makes more sense, whenever possible, initially to analyze claims involving alleged impairment of contract rights under the constitutional provision that more directly addresses such issues. *See, e.g.*, Robert Bork,

"Neutral Principles and Some First Amendment Problems," 47 IND. L.J. 1, 17 (1971).

Review of the Contract Clause issue is warranted because the case presents a particularly suitable vehicle for exploring a number of frequently recurring and unresolved Contract Clause issues. The facts of the case are largely undisputed; the Ninth Circuit's majority and dissenting opinions were largely in agreement regarding the underlying facts and diverged only with respect to the legal conclusions to be drawn from those facts.

A major focus of the disagreement between the majority and dissent was how courts should determine, in Contract Clause cases, whether there is even a contractual relationship that has been impaired. This Court has suggested that in Contract Clause cases "normally" the existence of a contractual relationship and the impairment of that relationship "are unproblematic" – that is, the plaintiff will have little difficulty making those showings. *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). But as both *Romein* and this case well illustrate, even when there is no doubt that a contract exists, the existence of a contractual agreement regarding relevant issues has almost always been contested in recent Contract Clause cases.

The crux of the disagreement among the appeals court judges generally centered on how readily federal courts ought to be willing, for Contract Clause purposes, to discern the existence of "implied" contract terms where no contract term explicitly addresses an issue. The Ninth Circuit majority was extremely reluctant to recognize "implied" contract terms. It stated, "Because the lease agreement contains an integration clause, the lease represents the parties' entire agreement, and there can be no implied terms." Pet. App. 17a.. Later in its

opinion, the majority relented only slightly from that position, stating that although "implied contractual terms can form the basis for a Contract Clause claim," in order for a court to recognize such a claim "'the contracting parties [must] . . . manifest[] assent' to such a term, and such a term must be 'so central to the bargained for exchange between the parties, or to the enforceability of the contract as a whole, that it must be deemed to be a term of the contract.'" *Id.* 18a (quoting *Romein*, 503 U.S. at 188-89). In contrast, the dissent was far more willing to imply contract terms. The dissent began its analysis of the issue by noting a "general principle of contracts that the agreement between the parties is contained within the four corners of the document." *Id.* 42a. Based on that principle, the dissent concluded that when the government is a party to a contract and could have – but did not – negotiate for imposition of additional financial burdens on the opposing party, it should be implied that the parties agreed that the government would not later seek to impose those burden during the term of the lease. *Id.* Applying those differing approaches, the majority and dissent arrived at diametrically opposed conclusions regarding whether Berkeley and RUI had a contractual agreement that Berkeley would seek to impose new costs on RUI only through the contract renegotiation process.

Whether an agreement constitutes a contract for purposes of Contract Clause analysis is a question of federal law. *Romein,* 503 U.S. at 187. This Court has provided little guidance on that issue, and the effects of that lack of guidance are readily apparent in the wildly differing conclusions that appeals court judges reached regarding the scope of RUI's and Berkeley's contractual agreement – even though the agreement is reduced to a written documents whose words are not disputed. Under those circumstances, this case would be a particularly appropriate vehicle for the Court to provide badly

needed guidance regarding when "a contractual relationship" can be deemed to exist for Contract Clause purposes.

This case also would afford the Court an opportunity to provide guidance on another issue that has perplexed the lower courts: what degree of deference is due a legislative determination that a regulation is appropriate? This Court has displayed far less deference when the governmental unit alleged to have impaired a contract is itself a party to that contract. Under those circumstances, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *United States Trust Co.*, 431 U.S. at 26.

However, the Ninth Circuit held that the stricter standard of *United States Trust Co.* was inapplicable here – despite the fact that Berkeley is a party to the RUI lease – because it was able to dispose of this case at the first stage of the Contract Clause analysis (whether the Marina Amendment operates as a substantial impairment of a contractual relationship). *See* Pet. App. 25a ("The government's supposed self-interest is simply not relevant to the factual determinations prerequisite to a finding on this threshold issue – formation, terms, and impairment."). Nothing in this Court's case law supports the Ninth Circuit's decision not to apply the stricter *United States Trust Co.* standard to all phases of its Contract Clause analysis. The Ninth Circuit based that decision on its belief that any government self-interest would have no effect on issues relevant to the "substantial impairment" determination. *Id.* But there is no obvious reason why that should be so.

Indeed, the facts of this case should give anyone pause before he/she categorically asserts that government self-interest is irrelevant to the "substantial impairment" determination. The Marina Amendment adopted by Berkeley

imposed substantial financial obligations on RUI *and on no one else.* Those obligations were imposed based solely on RUI's status as a Marina lessee. It unquestionably is in Berkeley's self-interest to provide the courts with a one-sided account of events leading up to execution of the RUI lease, in order to minimize the possibility that the courts will determine that the parties reached an agreement on an issue relevant to RUI's Contract Clause claim. It is also in Berkeley's self-interest to assert (as it did) that it should not be deemed to have agreed not to impose an increased minimum wage during the term of the RUI lease because any such agreement would violate public policy against bargaining away police powers. Pet. App. 19a. Under those circumstances, it makes little sense to do as the Ninth Circuit did and grant deference to Berkeley's actions with respect to formation, terms, and impairment of the contract. At the very least, it would be appropriate for the Court to grant review in order to provide guidance to the lower courts on this issue.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS

Review of the Contract Clause issue is warranted for the additional reason that the Ninth Circuit's decision is in direct conflict with a number of this Court's Contract Clause decisions. In particular, the manner in which the Ninth Circuit went about determining the parties' contractual understandings cannot be squared with this Court's recent decisions as well as the decision of at least one other appeals court.

Judge Bybee in dissent concluded that the parties had made clear by their course of dealing that they intended the lease to reflect all costs that would be imposed on RUI by Berkeley in connection with its Marina lease. In support of

that conclusion, he pointed to cost items that were the subject of the 1996 lease renegotiation, such as the increased rental payments, $50,000 RUI was required to spend on a grease trap, and the $7,000 RUI was required to spend on landscaping. Pet. App. 43a-44a. Based on that history of negotiations and the lease's silence on the question of RUI's wages and benefits (other than the lease's requirement that RUI comply with Berkeley's nondiscrimination policies), Judge Bybee concluded:

> The fact that the lease, which constitutes the entire agreement between the parties, does not set employee wages and benefits necessarily implies that the parties agreed not to contract on wages and benefits.

Id. 44a.

As noted above, the majority responded by invoking a diametrically opposed method of contract interpretation. The majority stated, "Because the lease agreement contains an integration clause, the lease represents the parties' entire agreement, and there can be no implied terms." *Id.* 17a. It asserted later that no contract term can be implied unless the contracting parties have manifested their assent to the term, and that RUI had not shown "how Berkeley manifested it assent" to any implied contract terms. *Id.* 18a.

It is the dissent's approach to contract interpretation that is far truer to the approach this Court has taken in past Contract Clause cases. For example, in determining whether government regulation substantially impairs any contract rights, the Court has "consider[ed] whether the industry the complaining party has entered has been regulated in the past." *Energy Reserve Group*, 459 U.S. at 411 (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 n.13

(1978)). *See also Lipscomb v. Columbus Municipal Separate School District*, 269 F.3d 494, 504 (5th Cir. 2001) ("In considering whether an impairment to contract is substantial, the court should consider the expectation of the parties with respect to changes in the law. Particularly relevant to this inquiry is whether the subject matter of the contracts had been subject to regulation at the time the contracts were made.").

The approach of the Ninth Circuit majority is inconsistent with *Energy Reserve Group*. Under that decision, it is highly relevant that, prior to 2000, Berkeley had never before imposed any minimum wage and benefit requirements on its lessees and contractors. As of 1996, RUI had every reason to believe that Berkeley would not impose such requirements and had agreed through its course of dealing not to seek to impose additional costs on RUI except through the lease renegotiation process. The majority faults RUI for having failed to insist on a lease term that explicitly prohibited new minimum wage and benefits requirements without a corresponding decrease in rent. But under that theory of contract interpretation, no government contractor could ever fully protect itself. No matter how lengthy a lease, there will always be some items omitted; and under the majority's analysis a government will always be in a position to frustrate a contractor's desire for predictable costs by adopting an ordinance that seizes on one of the omitted items as a basis for unilaterally increasing the contractors' costs. Allowing such unpredictable costs undermines the "anchoring purpose" of the Contract Clause, which is "'enabling individuals to order their personal and business affairs according to their particular needs and interests.'" *Romein*, 503 U.S. at 190 (quoting *Allied Structural Steel*, 438 U.S. at 245).

The majority's approach is also inconsistent with this Court's decisions regarding exercise of the police power. The

majority insisted that any agreement by Berkeley not to impose (during the term of the lease) increased wage and benefit requirements "would be void as against public policy." Pet. App. 19a. But this Court has never held that public policy requires that governments not be permitted to contract away, for a limited period, their right to impose increased monetary exactions on their citizens. Rather, the public policy requirement has been invoked to ensure that the police power is always available to protect public health and safety. *See, e.g., Northern Pacific Ry. Co. v. Minnesota,* 208 U.S. 583 (1908) (agreement between railroad and Minnesota that railroad has no obligation to maintain its bridges is unenforceable as against public policy). If Berkeley believes that the public welfare requires that lower-income workers receive higher salaries, there is nothing to prevent Berkeley from providing the funds itself if it is barred by contract from imposing those costs on an employer. *See Lipscomb,* 269 F.3d at 505 ("Purely financial obligations, however, do not surrender aspects of the State's sovereignty, and thus are subject to the Contract Clause.").

Finally, as Judge Bybee noted, the Contract Clause has long been viewed as codifying the "antiretroactivity principle." Pet. App. 54a (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)). The Ninth Circuit majority's rejection of RUI's Contract Clause claim is inconsistent with that principle. Because it imposes a substantial financial obligation retroactively on one of Berkeley's lessees – and on the basis of circumstances unique to RUI, not on the basis of some generally applicable policy designed to remedy "broad, generalized economic or social problem[s]," *Allied Structural Steel*, 438 U.S. at 250 – the Marina Amendment "is not a valid exercise of police power" but rather "contravenes the Contract Clause." Pet. App. 55a.

In sum, the Court should grant review to resolve the conflict between the decision below and this Court's Contact Clause decisions.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

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